125-54

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 341. 64

THE UNION TRUST COMPANY OF NEW YORK AND THE ST. LOUIS AND CARIO RAILROAD COMPANY, APPELLANTS,

vs.

WILLIAM R. MORRISON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 6, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 29, 1887.

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1 *Placita.*

Pleas in the circuit court of the United States of America within and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit of the United States *pro tempore*, sole judge of said court, on Monday, the 5th day of May, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

J. A. JONES, *Clerk.*

Bill to Foreclose Mortgage, &c.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY, WILLIS CAUBLE, and HENRY HOLBROOK. } No. 5187. In Chancery.

In the Matter of the Intervening Petition of WILLIAM R. MORRISON, filed in the above-entitled cause.

2 Be it remembered that on the 25th day of August, in the year of our Lord one thousand eight hundred and eighty-four, came the parties to foregoing-entitled intervening petition, by their respective solicitors, and filed in the office of the clerk of said court a stipulation in the matter of said intervening petition; which said stipulation is in the words and figures following, to wit:

Stipulation for Supreme Court Record.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

In the Circuit Court of the United States for said District. In Equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD COMPANY and Others.

Foreclosure.

In the Matter of the Intervening Petition of WILLIAM R. MORRISON, filed June 30, 1881, and the supplementary petition thereto, filed June 5th, A. D. 1882.

Stipulation.

For the purpose of shortening the transcript of the record to be prepared for the Supreme Court in the matter of the aforesaid, on
3 appeal by the Union Trust Company of New York aforesaid and by the St. Louis and Cairo Railroad Company from the

decree rendered in the matter aforesaid, it is hereby stipulated and agreed between the parties in interest in the matter aforesaid as follows:

First. That on the 2d day of October, A. D. 1871, the Cairo and St. Louis Railroad Company, a railroad corporation organized and doing business under the laws of the State of Illinois, executed, acknowledged, and delivered its certain mortgage or deed of trust to the Union Trust Company of New York, which mortgage or deed of trust was thereafter and early in the year 1872 duly recorded in the office of the recorders of deeds in the various counties into or through which the line of railroad of the said Cairo & St. Louis Railroad Company was located, and which mortgage was given upon all the property and assets of the said railroad company of every nature and kind, real, personal, and mixed, then held and owned or thereafter to be acquired by the said railroad company, and also upon "the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity," in and to the same, &c., and which said mortgage or deed of trust was given to secure the payment of the principal and interest specified in two thousand five hundred bonds of the said railroad company, dated on the
4 same second day of October, 1871, numbered from 1 to 2,500, inclusive, and being for the sum of one thousand dollars each, payable on the 2d day of October, A. D. 1901, and each drawing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each year, and which bonds were, at the same date, executed and delivered by said railroad company; that the said mortgage or deed of trust provided also for the payment to the said Union Trust Company of New York of the sum of twelve thousand five hundred dollars on the first day of May, A. D. 1873, and the further sum of twelve thousand five hundred dollars on the first days of November and May, respectively, annually thereafter, as and for a sinking fund for the purchase or redemption of said bonds; that said mortgage also provided that in case of default in the payment of any semi-annual instalment of interest accruing on said bonds or any thereof, and if said default should continue for the space of three months, or in case of the default in the payment of any instalment provided for in said mortgage or deed of trust to be paid to the trustee as and for a sinking fund aforesaid, and if such default should continue six months, &c., then and in either case it should be lawful for the said Union Trust Company of New York as trustee, by its duly authorized agent, attorney, or officer, to enter into and take full possession of said railroad property and assets
5 and of the rights, franchises, &c., granted by said mortgage, and to have, hold, possess, enjoy, and operate the said road by such superintendents, managers, receivers, assistants, and servants, or other agents or attorneys, as to the said trustee should seem proper, and to make, from time to time, all such repairs and replacements and all such useful alterations, additions, and improvements to the

said railroad and premises as the said trustee might deem expedient and judicious; that said mortgage or trust deed contained also a provision that in case default should be made in the payment of interest of any semi-annual instalment of interest to accrue on any of the said bonds when such interest should become payable, and if such interest should remain unpaid and in arrears for the space of six months, then and in each and every such case of the happening and continuing of such default in the payment of interest the principal of each and of all of the said bonds might be declared by the trustee for the time being under such mortgage or deed of trust, or by a majority in interest of the bondholders of all such bonds outstanding at its or their option, to be, and thereupon the same should become, due and payable immediately, notwithstanding the time limited therein for the payment thereof might not have
6 elapsed; that each of said bonds also contained a provision that if default should be made in the payment of any half-yearly instalment thereon when such instalment should become and remain so due and in arrears for the period of six months, then the principal of such bonds, as well as the principal of each of the bonds of the series aforesaid, could and might be declared and made to become due and payable immediately in the manner and with the effect provided and declared in the said deed of trust or mortgage; that the said 2,500 bonds certified by said trust company were sold and delivered to *bona fide* purchasers for value during or about the year 1872.

Second. That on or about the first day of October, A. D. 1873, a large number of coupons or interest warrants of the said bonds, due and payable on the said first day of October, 1873, were duly presented for payment at the place provided for in said mortgage or deed of trust, and payment of the same duly demanded of the said Cairo & St. Louis Railroad Company, which payment was refused by said company; that said railroad company also defaulted in the payment of each and every semi-annual instalment of interest so in said respective bonds promised and agreed by it to be paid, falling due upon and since the said first day of October, 1873; that at the time of the filing of the bill of complaint in this cause (namely, December 6th, A. D. 1877) each and every such instalments of interest
7 still remained due and unpaid; that the default by the said railroad company in the payment of said instalment due October 1st, A. D. 1873, and the said several other defaults, respectively, up to and including the default on the first day of April, 1877, each continued for more than six months after the said defaults, respectively, in the payment of such interest, and had so continued for more than six months at the time of the filing of the bill of complaint in this cause; that in consequence of said several defaults in the payment of the semi-annual instalments of interest on said bonds and of the continuance of such defaults as aforesaid the said Union Trust Company of New York by instrument in writing under seal and bearing date November 8th, 1877, did on that day declare the principal of each and all of the said bonds to be due and payable immediately; that the said railroad company also

failed to make payment of each and every instalment provided in said deed of trust to be paid to the said trustee as for a sinking fund; that thereafter and during the said month of November, A. D. 1877, the holders and bearers of the said bonds requested, in writing, the said Union Trust Company of New York to take appropriate and legal proceedings to enforce the rights of such holders and bearers, and to foreclose the said mortgage or deed of trust.

Third. That, in pursuance of the premises, the said Union Trust Company of New York, on the 6th day of December, A. D. 1877, filed their bill of complaint (verified by affidavit) against the
8 said Cairo & St. Louis Railroad Company and others, as defendants, in the circuit court of the United States for the southern district of Illinois for the appointment of a receiver and for the foreclosure of the said mortgage or deed of trust, &c., in which bill of complaint all the facts in respect to the execution and delivery of the said mortgage or deed of trust aforesaid and in respect to the execution and delivery of the said bonds and the sale thereof, and also in respect to the defaults in the payment of interest instalments and the instalments for the sinking fund aforesaid, were fully set forth; and said bill likewise contained averments that said railroad company was insolvent and that all the property and assets thereof were insufficient in value to secure the payment of the said bonds; that the revenue of the said railroad company was not sufficient to pay the interest on the bonds, &c. The bill contained the usual prayer for foreclosure of the said mortgage or deed of trust, the ascertainment of the amount due on the said bonds and coupons, the appointment of a receiver, and for other relief, etc.

Fourth. That the said defendant railroad company, having theretofore had due notice from the complainant that application would be made on the said 6th day of December, A. D. 1877, for the appointment of a receiver for the railroad property and assets of the said railroad corporation, appeared before the said circuit
9 court of the United States of the southern district of Illinois upon the filing of the bill aforesaid; that thereupon, after argument by counsel, said court entered a decree of the same sixth day of December, A. D. 1877, appointing Henry W. Smithers receiver of the said railroad and of all the property and assets of the said railroad company, and authorizing and requiring said railroad company to surrender full possession of the said railroad and all the property and assets of the said company to said receiver, and giving said receiver full power to operate the said railroad, to make all payments necessary or proper for operating said railroad and equipping the same and putting said mortgaged property in repair or that might otherwise be necessary for the conduct of the receivership, and also to exercise all such other authority and to do and perform all such other acts as receiver as are usual in such cases, which decree, among its other provisions, contained the following:

"The said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all

amounts due and owing by said railroad company for labor or supplies that may have accrued in operation and maintenance of the said railroad property within six months immediately pre-
10 ceding the rendition of this decree."

The foregoing provision is the only one contained in such decree providing for payments of any amounts then due or owing by said railroad company for labor or supplies or other claims, except for taxes against said railroad property.

Fifth. That the said receiver thereupon, on the same sixth day of December, A. D. 1877, took full possession of the said railroad and property, and thereafter had control of the same and operated said railroad until the delivery of the possession of such railroad and property to the St. Louis and Cairo Railroad Company, a corporation then organized and doing business under the laws of the State of Illinois (the present owner thereof), on the 1st day of February, A. D. 1882.

Sixth. That on the 16th day of May, A. D. 1881, a decree for payment and sale was rendered in the said foreclosure suit by said circuit court, wherein the allegations of the bill of complaint were found to be true, and wherein there was found to be due by the said Cairo & St. Louis Railroad Company upon the said bonds and coupons up to that date the sum of four millions three hundred and one thousand one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53), and requiring such amount, with interest thereon, to be paid into court on or before the 26th day of May, 1881, together with the costs of the cause, or in default thereof that the property be sold by the master in chancery, as special commissioner,
11 after publishing notice of the time, place, and terms of sale, as specified in such decree; that thereafter, the payment of such sum not having been made nor of any part thereof, the master in chancery of said court, as such special commissioner, after having given the notice required by such decree, and on the 14th day of July, A. D. 1881, sold the said railroad and property at public vendue according to the requirements of such decree and at the time and place specified in the notice, the sale being made to Josiah A. Horsey and Charles J. Canda for the sum of four million dollars ($4,000,000.00), they being the highest and best bidders therefor, which sale was thereafter and on the same 14th day of July, A. D. 1881, duly ratified and approved by said court; that the said sum of four million dollars is all that has ever been realized upon the said bonds and coupons so secured by the aforesaid mortgage or deed of trust; that said Cairo & St. Louis Railroad Company was then and still continued to be insolvent.

Seventh. That thereafter, and on the 22d day of December, A. D. 1881, said Josiah A. Horsey and Charles J. Canda having complied with the terms of sale, the master in chancery, as special commissioner as aforesaid, in pursuance of the decree of the said circuit court of the United States for the southern district of Illinois rendered on said December 22d, A. D. 1881, in said foreclosure cause, requiring him to do so by good and sufficient deed in writing,

conveyed said railroad and property and assets of the said
12 Cairo & St. Louis Railroad Company to them, the said Horsey and Canda, subject to the lien of any and all claims against the said railroad property and assets which then were before said court by intervening petition, and which should be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by the said mortgage or deed of trust; that thereafter, and on January 30th, 1882, Henry W. Smithers, receiver of the said railroad and property, by sufficient deed in writing, conveyed to the said Josiah A. Horsey and Charles J. Canda all his claim, right, title, and interest in and to said railroad, property, and assets, in pursuance of a decree of the said circuit court entered in said foreclosure case on the 19th day of January, A. D. 1882, requiring him so to do; that thereafter, and on the 31st day of January, A. D. 1882, the said Josiah A. Horsey and Charles J. Canda, by sufficient deed in writing, conveyed the said railroad, property, and assets to the said St. Louis and Cairo Railroad Company aforesaid; that thereafter, and on the 1st day of February, A. D. 1882, the said Henry W. Smithers, receiver as aforesaid, in pursuance of the decree of the said circuit court entered in said foreclosure cause on said January 19th, 1882, requiring him to deliver the possession of said railroad, property, and assets to the purchasers or their grantees on demand, delivered the same to the said St. Louis
& Cairo Railroad Company, a corporation organized and ex-
13 isting under the laws of the State of Illinois, which company have ever since been the owners and in possession of said railroad and property, and are still the owners and in possession and control of the same; that the said conveyances by the said master in chancery as special commissioner and by said receiver were duly approved and ratified by the said circuit court of the southern district of Illinois immediately after the execution of the same.

Eighth. That it was required in the said decree for payment and sale, entered in said foreclosure proceeding by said circuit court of the southern district of Illinois on May 16th, 1881, "that all persons having claims or liens against the said railroad and property, or against the proceeds of the sale thereof," and not then before the court, should "file intervening petitions on or before the first day of July, A. D. 1881," in said foreclosure cause, and that notice of such provision of said decree, signed by the clerk of said court, should be published once a week for four successive weeks in a newspaper published in each of the cities of East St. Louis, Illinois, and St. Louis, Missouri; that in accordance with the aforesaid requirements of said decree there was duly published once in each week for four successive weeks prior to the first day of July, A. D. 1881, in "The Evening
Chronicle" and "The East St. Louis Herald," newspapers pub-
14 lished, respectively, in the cities of St. Louis, Mo., and East St. Louis, Illinois, notice, signed by said clerk, of entry of the aforesaid order or decree, requiring all persons having claims or liens against the said railroad or property, or against the proceeds of the sale thereof, to file their said claims in said cause in said circuit court on or before the first day of July, A. D. 1881; and that thereafter and

and all such

on the fifth day of July, A. D. 1881, said court entered an order in said cause, whereby it was ordered, adjudged, and decreed that no claim presented therein after the first day of July, A. D. 1881, should be received or filed in said cause, and that all persons who had not on or before the said first day of July A. D. 1881, filed their claims therein, and all claims not so filed on or before said date, should be, and thereby were, forever debarred and excluded from any and all participation in or benefit from or under the decree in said cause or from the property and assets therein mentioned, or from the proceeds of the sale of said property under said decree for payment and sale.

Ninth. That in the month of February, 1878, the receiver filed the following petition in said foreclosure proceeding asking leave to protect the sureties on injunction and appeal bonds given by the Cairo & St. Louis Railroad Company prior to the filing of the bill of complaint in this cause:

15 *Petition of Receiver for Leave to Protect Sureties on Bonds, &c.*

In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY.

To the honorable the judges of the circuit court of the United States in and for the southern district of Illinois, in chancery sitting:

Your petitioner, Henry W. Smithers, unto your honors respectfully represents that by decree of this court rendered in this cause on the sixth day of December, A. D. 1877, he was appointed receiver of the property, effects, &c., of the Cairo & St. Louis Railroad Company, to which decree remaining of record in this court your petitioner asks leave to refer as a part of this his petition; and, having been thus appointed such receiver, your petitioner at once entered upon the discharge of his duties as such, and thence hitherto has been acting and now is acting in that capacity.

And your petitioner further represents unto your honors that, at the time your petitioner was so appointed as such receiver, there were and still are pending in various courts of the States of Illinois and Missouri, and in the Supreme Court of the United States
16 of America, certain suits or legal proceedings in which the said Cairo & St. Louis Railroad Company were and are parties or directly interested; a list of which suits or proceedings, with memoranda concerning the same, is hereto attached, and to which your petitioner begs leave to refer as a part of this petition, each of which causes or proceedings is now pending upon appeal from the judgment or decree of an inferior tribunal, and in each case a proper appeal bond, with security, was given before your petitioner's said appointment as receiver.

And your petitioner shows that such appeal bonds were given by some of the officers of the said railroad company, with others, as

sureties, in order to protect the rolling-stock or personal property of said railroad company from levy or sale under execution pending the determination of the appeals; in each of which cases executions on the judgment or decree was either levied on personal property of said railroad company or the levy thereof threatened at — time of taking the appeal and giving the bond.

And petitioner shows that in one of the said cases (namely, The Cairo & St. Louis Railroad Company against Henry Holbrook) a bill in chancery was originally filed by said railroad company in the circuit court of St. Clair county, Illinois, to restrain the collection of a judgment against said company for about ten thousand dollars in favor of said Holbrook, and which judgment was
17 claimed by said company to be inequitable and unjust and to have been fraudulently obtained; in which proceeding an injunction was awarded upon a bond, with a surety, being given, and which bond was given and the injunction thereupon issued. And petitioner shows that the venue in said cause was changed to the city court at Alton, Illinois, wherein a hearing was had and a decree rendered against said company dismissing the bill; from which decree an appeal was taken by said company to the supreme court of Illinois, the necessary bond, with security, being given, and which appeal is still pending and undetermined. And your petitioner shows that the sureties on all said appeal bonds claim, and truly, so far as your petitioner is informed, that they executed such appeal or other bonds in every case at the instance and request of the company, and for its benefit solely, having no personal interest whatever in the subject-matter of any of the suits; that they did so, relying on the assurances of the company that they should be protected, and in the belief that all the property of the company would stand pledged to hold them harmless; that their action has been to the benefit of all parties interested in the property of said railroad company, as in default of payment, which they were assured the company had not then the ability to make, property of the
18 company would have been sacrificed to meet the demands.

Your petitioner, therefore, states that he desires the special advice and instruction of this court in respect to said several appeal cases and the prosecution thereof, and in regard to said several bonds, and especially as to whether your petitioner shall protect the said several sureties and save them harmless from or by reason of their obligations under said several and respective bonds in the event of adverse decisions in any or all of said cases or proceedings.

Wherefore your petitioner prays the court to grant him such advice and instruction; and he will ever pray, &c.

H. W. SMITHERS, *Receiver.*

UNITED STATES OF AMERICA, }
City & County of New York, } *ss:*

On this 29th day of December, A. D. 1877, before me personally appeared the above-named Henry W. Smithers and made oath that he has read the above and foregoing petition subscribed by him

and knows the contents thereof, and that the matters and things therein set forth are true to the best of his information or belief.

In witness whereof I hereunto set my hand and affix my seal of office the day and year last above written.

[L. S.] THOS. T. EVANS,
Notary Public, No. 6, N. Y. City & County.

19 EXHIBIT "A."

List of Cases Wherein Appeal Bonds or Other Bonds Have Been Filed.

Michael Brennan *vs.* C. & St. L. R. R. Co.	Circuit court of St. Louis Co. Appeal bond filed. A garnishee proceeding *vs.* Barthold, Lewis & Co.	
Owen Clark *vs.* Same.	Same.	
Samuel Edmonds *vs.* Same.	Same.	
Peter Keane *vs.* Same.	Same.	
Peter Keane *vs.* Same.	Same.	
Peter Keane *vs.* Same.	Same.	
Joseph Mahoney *vs.* Same.	Same.	
Edmund Mosher *vs.* Same.	Same.	Test case, the others to abide this.
Edward O'Brien *vs.* Same.	Same.	
Herman Apel *vs.* Same.	Same.	Assigned to A. R. Taylor.
20 Peter Keane *vs.* Same.	Same.	
Frederick Seiwold *vs.* Same.	Circuit court of St. Clair Co. Appeal bond filed.	

William Waller *vs.* Same.	Circuit court of Jackson Co. Appeal bond filed.
Fred. Seiwold *vs.* C. & St. L. R. R. Co.	Circuit court of St. Clair Co. Awaiting decision of Carr case in Sup. C't, involving same question. Appeal bond filed.
John Killenburg *vs.* Same.	Circuit court of St. Clair. Co. Judgment for pl'ff. Appealed to Sup. C't. Reversed and remanded. Appeal bond filed.
Lee Goff *vs.* Same.	Circuit court of St. Clair Co. Same. Same.
John Killenburg *vs.* Same, as Garnishee of Avery.	Circuit court of St. Clair Co. Appeal bond filed.
Napoleon Ham *vs.* C. & St. L. R. R. Co.	Circuit Court of St. Clair Co. Appeal, same.
Maston Strickland *vs.* Same, as Garnishee of F. E. Canda.	Circuit court of St. Louis Co. Appeal, same.
F. J. Donovan *vs.* C. & St. L. R. R. Co.	Circuit court of St. Louis county. Appeal, same.
21 F. I. Donovan *vs.* C. & St. L. R. R. Co.	Circuit court of St. Louis county. Appeal, same.
Same *vs.* Same.	Same.
M. H. Phelan *vs.* Same.	Same.
Same *vs.* Same.	Same.
Same *vs.* Same.	Same.
Same *vs.* Same.	Same.

	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	M. Tyrell *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
22	Same *vs.* Same.	Same.
	Same *vs.* Same.	Same.
	H. W. Hample *vs.* Same.	City court of East St. Louis. Appeal bond filed.
	C. & St. L. R. R. Co. *vs.* Henry Holbrook	City court of Alton. Appeal bond filed.
	Silas Adsit *vs.* C. & St. L. R. R. Co.	Circuit court of Jackson county. Appeal bond filed.
	Alexander Darcot *vs.* Same.	Circuit court of Union county. Appeal bond filed.
	John Faggitt, Administrator of William J. Gilbert, Dec'd, *vs.* Same.	Circuit court of Alexander Co. Appeal bond filed.

City of Jonesborough *vs.* Same.	Circuit court of Union Co. Appeal bond filed.
Ulrich Gerber *vs.* Same.	Circuit court — St. Clair Co. Appeal bond filed.
John Killenburg *vs.* Same, William S. Searls, and John B. Livingstone.	Same.
Marcus G. Reynolds *vs.* C. & St. L. R. R. Co.	Circuit court of Jackson county. Appeal bond filed.
23 Phillip Easterly, Administrator of the Estate of Jermiah Callahan, Deceased, *vs.* C. & St. L. R. R. Co., Harvey R. Payson, and Ferdinand E. Canda.	Circuit court of Jackson county. Appeal b'd filed.
G. & G. A. Koerner *vs.* C. & St. L. R. R. Co.	Circuit court of St. Clair Co. Appeal bond filed.
Louis Janbert *vs.* Same.	Circuit court — Jackson Co. Appeal bond filed.
Christian Hartman *vs.* Same.	Same.
William Bauer *vs.* Same.	Same.
William Peoples *vs.* Same.	Same.
Francis E. Warrington *vs.* Same.	Circuit court of St. Clair county. Appeal bond filed.
The People of State of Illinois, for Use of Town of Columbia, for the School Fund, *vs.* Same.	Circuit court of Monroe county. Appeal bond filed.
James McGuire *vs.* Same.	Circuit court of Jackson county. Appeal bond filed.

Albert Lewis *vs.* Same.	Circuit court of Alexander county. Appeal bond filed.
24 Margaret Curran, Administrator of John Curran, *vs.* Same.	Circuit court of Alexander county. Appeal bond filed.
George Hartman *vs.* Same.	Same.
F. A. Short *vs.* Same.	Same.
Louis H. Meyers *vs.* Same.	Same.
W. Metcalf *vs.* H. R. Payson and Co. and C. & St. L. R. R. Co.	Circuit court of St. Louis. Appeal bond filed.
H. W. Smithers *vs.* Sam'l S. Taylor *et al.*	U. S. circuit court at Springfield. Bond for costs.
John Ostgui *vs.* C. & St. L. R. R. Co.	Circuit court — St. Clair Co. Appeal bond filed.

(Endorsed:) Filed Feb'y 4, A. D. 1878. J. A. Jones, clerk.

And that an order as follows was entered by said court, but the receiver never took any action under such authority.

2. *Decree Authorizing Receiver to Protect Sureties on Bonds, &c.*

In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

25 MONDAY, *February 4th*, A. D. 1878.

Present: Hon. Samuel H. Treat, district judge.

UNION TRUST COMPANY OF NEW YORK *vs.* CAIRO AND ST. LOUIS RAILROAD COMPANY. } 5187.

And now, on this day, the receiver, Henry W. Smithers, appointed by decree of this court rendered in this cause on the sixth day of December, 1877, having presented to the court his petition, verified by affidavit, asking the special advice and instruction of the court

in respect to the prosecution or defence of certain appeal and other cases particularly indicated and mentioned in a list made an exhibit to said petition; and especially asking the advice and instruction of this court as to whether he, the said receiver, shall protect the several sureties on the appeal and injunction and other bonds referred to in said petition and save them harmless from or by reason of their obligations under said several and respective bonds in the event of adverse decisions in any or all of said cases; and the court having now considered said petition and the matters therein contained, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court that said receiver may —, and he is hereby,
26 authorized, in his discretion, to prosecute or defend (as the case may be) the appeals and other cases mentioned and referred to in said petition according as the interests of the receivership shall, in his judgment, be best promoted; and that he is hereby also authorized, in his discretion, to protect the sureties on the said several bonds mentioned or referred to in said petition and save them harmless from or by reason of their obligation under said several and respective bonds, using his discretion in each case, saving harmless such sureties as in his judgment ought to be so protected in equity and good conscience by reason of the protection afforded the property and assets of the Cairo and St. Louis Railroad Company through or by means of the giving of such bonds, or any or either thereof, or such of said sureties as ought for other equitable reasons to be so protected.

And, for the purposes of this decree, the said receiver is hereby authorized to use and pay out any moneys coming into his hands as such receiver over and above what may be necessary to retain or pay out to meet the operating and repairing expenses of said Cairo & St. Louis railroad and for labor, materials, and supplies needed in the care, operation, and preservation of said railroad and the property in the hands of said receiver, it being the intention of the court to require the expenses for operating, repairing, and maintaining to be first paid before any funds in the hands of the
27 receiver shall be used for the other purposes permitted by this decree.

Tenth. And it is further stipulated by and between the parties that no citation need be issued in this cause for service on the intervening petitioner or his counsel, the same being hereby waived.

Dated August 15th, A. D. 1884.

JUDD & WHITEHOUSE,
Sol'rs for the Union Trust Co. of New York and the St. Louis & Cairo Railroad Company.
G. & G. A. KOERNER,
Sol's for Wm. R. Morrison.

(Endorsed:) Filed August 25th, 1884. J. A. Jones, clerk.

And be it also remembered that on, to wit, Tuesday, the 5th day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-one, the following proceedings

were had in said court in said foreclosure cause and entered of record, to wit:

Decree Debarring Claims, &c.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

28 This cause, coming on for further consideration, and it appearing to the court here that in accordance with the provisions of an order of this court in this cause entered on the 16th day of May, A. D. 1881, there have been heretofore duly given and published once in each week for four successive weeks prior to the first day of July, A. D. 1881, in the "Evening Chronicle" and "East St. Louis Herald," newspapers published, respectively, in the cities of St. Louis, Missouri, and East St. Louis, Illinois, notices of the entry of the aforesaid order requiring all persons having claims or liens against the railroad or property in this cause mentioned, or against the proceeds of the sale thereof, to file their said claims in this court and cause on or before the first day of July, A. D. 1881:

Now, therefore, it is hereby ordered, adjudged, and decreed that no claim presented herein after the said first day of July, A. D. 1881, shall be received or filed in this cause, and that all persons who have not on or before said first day of July, A. D. 1881, filed their claims herein, and all claims not so filed on or before said date, shall be, and hereby are, forever debarred and excluded from any and all participation in or benefit from or under the decree in this cause, or from the property and assets therein mentioned, or from the proceeds of the sale of such property under said decree.

29 And afterwards, to wit, on Monday, the 1st day of August, at said June term of court, A. D. 1881, the following further proceedings were had in said court in said foreclosure cause and entered of record, to wit:

Decree for Spec'l Master to Report Amount to be Deposited, &c.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

This cause coming on again, and it being important to ascertain what amount of money ought to be required to be paid into court for the payment of receiver's certificates of indebtedness authorized by this court, and for the payment of any claims that may be allowed by the court, and all fees, costs, and expenses to be deducted from the proceeds of sale in this proceeding, on motion of Messrs. Judd and Whitehouse, solicitors and of counsel for complainant—

It is hereby ordered that it is referred to Frank H. Jones, Esq., the special master heretofore appointed herein, to examine and report the total amount of receiver's certificates of indebtedness au-

thorized by this court — remains outstanding and unpaid, including principal and interest; also the total amount of all claims against the receivership, or railroad assets in the receiver's possession, as shown by intervening petitions or claims filed in this
30 cause on or before July 1st, 1881 (that date having been fixed by decree of this court as the last day for filing claims, and the court having by like decree debarred claims filed herein after said July 1st, 1881)—that is, the total amount of all such claims "for labor or supplies that may have accrued in the operation and maintenance of" the Cairo & St. Louis Railroad "within six months immediately preceding the rendition" of the decree appointing the receiver in this cause (December 6th, A. D. 1877), that character of claims having been specified in such decree, and the receiver required to pay and discharge the same "after paying and discharging the expenses of operating, maintaining, and repairing said railroad and property and after making such other payments" authorized by said decree as might "be necessary for the conduct of the receivership."

And it is further ordered that said special master examine and report the total amount of other claims or asserted liens filed in this cause, giving the amount of each claim and the character thereof, with his conclusions as to whether or not, on the face of such other intervening petitions or claims, respectively (not covered by the foregoing terms of this order), there is a sufficient showing to warrant the court to require sufficient funds to be paid into court to cover the same; that said master also examine and report what further sum will probably be sufficient to cover the costs,
31 fees, and expenses to be paid out of the proceeds of sale in this cause.

And afterwards, to wit, on Thursday, the 22d day of December, at said June term of court, A. D. 1881, the following further proceedings were had in said foreclosure cause in said court and entered of record, to wit:

Order Confirming Report of Sale and Ordering Conveyance.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

And now, this cause coming on again upon the report of John A. Jones, special commissioner, and it appearing to the court by such report that there has been paid to the said special commissioner by Josiah A. Horsey and Charles J. Canda the full amount of their bid made at the sale of the railroad property and assets heretofore had under and in pursuance of the decree entered in this cause, to wit, the sum of one hundred thousand dollars in cash (and any excess thereof) in the first-mortgage bonds of said railroad company, such mortgage bonds consisting of two thousand four hundred and

ninety-four bonds, with all coupons, excepting four, attached, maturing on and after October 1, 1873:

32 Now, therefore, upon motion of Messrs. Judd and Whitehouse, solicitors for the complainant, it is ordered that the said report be, and is hereby, confirmed; and it is further ordered and decreed that the said John A. Jones, special commissioner, do forthwith execute, acknowledge, and deliver a good and sufficient deed of conveyance of the said railroad property and assets to the said Josiah A. Horsey and Charles J. Canda, the said railroad property and assets to be conveyed and held subject to all sums legally due for taxes which were at the time of such sale or are now an absolute legal lien upon the said property and assets prior or paramount to the lien of said mortgage or deed of trust; and subject also to the lien of all receiver's certificates or obligations issued under the order of this court that shall not be paid or discharged from the cash funds now in the hands of the said John A. Jones, special commissioner; and also subject to the lien of any and all claims against the said railroad property and assets which are now before this court by intervening petitions, and which shall be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust.

33 And afterwards, to wit, on Thursday, the 19th day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-two, the following further proceedings were had in said court in said foreclosure cause and entered of record, to wit:

Order Directing Receiver to Make Conveyance of Property, &c.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

And now, this cause coming on again, and the court having heretofore ordered the master in chancery as special commissioner appointed in this cause by decree entered herein on the 16th day of May, A. D. 1881, to execute, acknowledge, and deliver a good and sufficient deed to Josiah A. Horsey and Charles J. Canda, the purchasers of the Cairo & St. Louis railroad and of the property and assets in connection therewith and belonging thereto at the sale thereof made by such special commissioner on the 14th day of July, A. D. 1881, and said master as such special commissioner having executed, acknowledged, and delivered to said Josiah A. Horsey and Charles J. Canda a deed of and for said railroad and property, dated the 22d day of December, A. D. 1881, and acknowledged on the same day, which deed is in compliance with the orders and decrees of this court in that behalf, but does not fully cover, embrace,

34 and convey the legal title to certain real estate acquired by and conveyed to the said Henry W. Smithers as receiver as aforesaid, and which was purchased by said receiver under the

authority of this court, and which real estate, as well as all personal property, rolling-stock, etc., purchased by said receiver under the like authority of this court, in equity belongs to the railroad property and assets covered by and sold to said Josiah A. Horsey and Charles J. Canda under the authority of said decree of May 16th, A. D. 1881, and ought of right to be conveyed to them, now, therefore, on motion of Messrs. Judd and Whitehouse, solicitors and of counsel for complainant and for said receiver, it is hereby ordered, adjudged, and decreed that the said receiver, Henry W. Smithers, do execute, acknowledge, and deliver to the said Josiah A. Horsey and Charles J. Canda a good and sufficient deed of quit-claim, conveying to them all the real estate, rolling-stock, and personal property of every name and kind purchased or acquired by him as such receiver at any time since his appointment as such in this cause, and that he report to this court his compliance with this decree.

And it is further ordered that said receiver deliver the possession of all such real estate, rolling-stock, and personal property to said Josiah A. Horsey and Charles J. Canda, or to their grantee or grantees, when and at such time as the deed of said special commissioner to said Horsey and Canda shall be presented to him
35 and demand made for the surrender of the possession of said railroad, rolling-stock, personal property, and assets, either by said Josiah A. Horsey and Charles J. Canda or their grantee or grantees; and that when he so surrenders the possession of such real estate and other property he report to the court his doings in this behalf.

And on, to wit, the 30th day of June, in the year of our Lord one thousand eight hundred and eighty-one, came William R. Morrison, by his solicitors, and filed in said clerk's office his intervening petition in the said foreclosure cause and Exhibits "1" and "2" to said petition; which said intervening petition and exhibits are in the words and figures following, to wit:

Intervening Petition of William R. Morrison.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY, WILLIS CAUBLE, and HENRY HOLBROOK.

To the honorable the judges of the said court:

36 William R. Morrison, the intervening petition- herein, respectfully shows unto your honors that on the 26th day of November, A. D. 1872, at a term of the circuit court then being holden within and for the county of St. Clair, in the State of Illinois, the same being one of the counties of the said State into which the railroad described in the complainant's bill herein was then being constructed, one Henry Holbrook recovered a judgment against the said Cairo and St. Louis Railroad Company for the sum of nine

thousand five hundred dollars and costs of suit; that on the 3d day of January, A. D. 1873, the said Holbrook caused an execution to issue upon the said judgment in pursuance of the laws of the said State, directed to the sheriff of the said county to execute, which execution was returned by the said sheriff on April 3d, 1873, by order of said Holbrook's attorneys; that on the 27th day of October, 1874, said Holbrook caused an *alias* execution to issue upon the said judgment to the said sheriff to execute, and thereupon the said sheriff threatened to levy the said execution upon the rolling-stock and personal property of the said company within the said county of St. Clair, a greater proportion of the said rolling-stock being at — time in the said county.

That the said company, believing the said judgment to have been fraudulently and wrongfully obtained by the said Holbrook, had, previous to the issuance of the said *alias* execution, caused its
37 bill in equity to be filed in the said St. Clair circuit court against the said Holbrook and the said sheriff to restrain and enjoin the said Holbrook and all of his agents and attorneys from proceeding in any manner to collect the said judgment or any part thereof.

That such proceedings were afterwards had upon the said bill in equity that on the 30th day of December, A. D. 1874, while the said execution was in full force and a valid and subsisting lien upon a large number of engines, passenger, freight, and other cars and rolling-stock and personal propery of the said company, all of which were in the said county in the possession of the said company and subject to be levied upon by the said sheriff under the said execution, that the said company procured a temporary injunction, restraining the said Holbrook, his agents and attorneys, and the said sheriff in accordance with the prayer of the said bill.

That afterwards, at the April term, A. D. 1875, of the said circuit court such proceedings were had that the venue of the said suit wherein injunction had been granted as aforesaid, was changed to the city court of Alton, in the State of Illinois; that, in order to procure the said temporary injunction, it became necessary for the said railroad to give its injunction bond in the penal sum of nineteen thousand dollars to the said Henry Holbrook, his executors, administrators, or assigns, and that one of the conditions of
38 the said bond was that if the said railroad company and the sureties on the said bonds, their executors, administrators, or any of them, should well and truly pay or cause to be paid to the said Holbrook, his executors, administrators, or assigns, all moneys and costs due to the said Holbrook on the said judgment, and all costs and demands that should be awarded against the complainant in case the said injunction should be dissolved, then the said bonds should be void, and otherwise to remain in full force and virtue.

That your petitioner, at the request of the said company, and in order that it might litigate and finally determine the question of its liability to pay the said judgment, and because the said company believed in good faith that it was not liable to pay the said judgment, and that the same had been fraudulently and wrongfully

obtained, your petitioner became one of the sureties on the said injunction bonds, together with Henry R. Payson and Ferdinand E. Canda, both of whom are now insolvent.

That at the February term, A. D. 1877, of the said city court of Alton, upon a hearing of the said bill in equity, the said court dismissed the said bill; that thereupon the said railroad company prayed an appeal from the said decree dismissing the said bill to the supreme court of the said State, which appeal was duly perfected on the 10th day of April, 1877; whereupon the Honorable H. S. Baker, judge of the said city court, upon application of the
39 said railroad company, made an order continuing the said injunction in force until the final determination of the said appeal.

That at the June term, A. D. 1879, of the supreme court of said State the said decree of the said city court was by the said supreme court in all things affirmed, and the said appeal was finally determined, and the said injunction became and was thenceforth dissolved; that the said Henry Holbrook, at the September term, A. D. 1880, of the circuit court within and for the county of Monroe and State of Illinois, in which county your petitioner resides and owns property subject to execution, recovered a judgment against your petitioner upon the said injunction bonds for the sum of thirteen thousand nine hundred and sixty-five dollars and costs of suit.

Your petitioner further shows unto your honors that on the 26th day of June, A. D. 1875, the said company, being desirous of securing your petitioner and the said Payson and Canby as sureties upon the said injunction bond, executed and delivered to them a certain chattel mortgage, a copy of which, marked "Exhibit 1," is filed herewith and made a part of this petition; that in and by the said mortgage the said company incumbered to your petitioner and the said Payson and Canda certain locomotive engines therein described; that the said company and the receiver of this court here-
40 tofore appointed in this cause have used the said locomotive engines continuously since the execution of the said mortgage, and the same are now in the possession of the receiver, and are to be sold at the sale of the property mentioned in the said bill under the said decree of foreclosure.

Your petitioner further shows to your honors that one Henry W. Smithers, the receiver in the said cause, did, on the 4th day of February, 1878, file a certain intervening petition herein, asking, among other things, the leave of this honorable court to protect your petitioner and the other sureties upon the said injunction bonds against the consequences of having executed the same, a copy of which petition is marked "Exhibit 2" and filed herewith and made a part hereof; that this honorable court, in pursuance of the said petition, made and entered in the said cause its interlocutory order giving permission to the said receiver to so protect your petitioner and the said other sureties upon the said injunction bond; that the said receiver, since his appointment, has not been able, out of the earnings of the said railroad, to pay the said judgment of the said Holbrook, and thus protect the sureties upon the said bond.

Wherefore your petitioner prays right and justice, and that your honors will order and decree that he shall be fully protected
41 from all the consequences of signing the said bond and from the said judgment recovered against him in the said Monroe circuit court, and that such other and further relief in the premises may be granted to your petitioner as to equity may seem meet, etc.

WM. R. MORRISON,
By G. & G. A. KOERNER,
His Sol's.

(Endorsed:) Filed June 30, A. D. 1881. J. A. Jones, clerk.

"EXHIBIT 1" to Interv'g Petition.

This mortgage, made and entered into on this 26th day of June, A. D. 1875, by and between the Cairo and St. Louis Railroad Company, a corporation organized and operating under the laws of the State of Illinois, party of the first part, and Wm. R. Morrison, of Monroe county, Illinois, party of the second part, witnesseth as follows:

Whereas it heretofore became and was important for the protection of the rights and interests of the said party of the first part that it should execute a certain injunction bond, with good and sufficient securities, in the *final* sum of nineteen thousand dollars; and whereas it thereupon did execute such injunction bond, with Henry R. Payson, Ferdinand E. Canda, and the said Wm. R. Morrison as securities thereon, which bond is substantially in the words & figures following, to wit:

42 Know all men by these presents that we, The Cairo and St. Louis Railroad Company, Henry R. Payson, Fred. E. Canda, and Wm. R. Morrison, the latter of the county of Monroe and State of Illinois, are held and firmly bound unto Henry Holbrook, of Washington county and State aforesaid, in the sum of nineteen thousand dollars, to be paid to the said Henry Holbrook, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, jointly and severally, and our respective heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 24th day of November, A. D. 1874.

Whereas the above-bounden Cairo and St. Louis Railroad Company has filed its bill of complaint in the circuit court of the county of St. Clair and State of Illinois against the above-named Henry Holbrook, praying, among other things, for an injunction to restrain said Holbrook, his counsel, agents, and assigns, from in any manner collecting from or enforcing, by execution or otherwise, against said Cairo and St. Louis Railroad Company a judgment in said bill described, recovered by said Holbrook against said railroad company at the October term, 1872, of the circuit court of St. Clair county, Illinois, which judgment is for the sum of $9,500; and

Whereas Hon. Amos Watts, judge of the 23d judicial circuit of Illinois, has allowed an injunction for that purpose, according to

the prayer of said bill, upon the said Cairo and St. Louis Railroad Company giving bond and security, as provided by law,
43 and as required by the order of said judge granting said injunction:

Now, therefore, the condition of the above obligation is such that if the above-bounden Cairo and St. Louis Railroad Company, Henry R. Payson, Ferdinand E. Canda, and Wm. R. Morrison, their executors or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said Henry Holbrook, his executors, administrators, or assigns, all moneys and costs due to said Holbrook on the said judgment, and also all such costs and damages as shall be awarded against the said complainant in case the said injunction shall be dissolved, or for wrongfully suing out the said injunction, then the above obligation to be void; otherwise to be and remain in full force and virtue.

[SEAL.] THE CAIRO AND ST. LOUIS RAILROAD COMPANY,
By S. STAATS TAYLOR, *President.*
HENRY R. PAYSON. [SEAL.]
FERDINAND E. CANDA. [SEAL.]
WILLIAM R. MORRISON. [SEAL.]

Attest: F. BROSS, *Sec.*

And whereas the said party of the first part, wishing to save harmless the said sureties from any damage that might arise from any breach of the condition of said bonds, did on the — day of ——, 1875, by its board of directors, make and enter the following order, to wit:

Resolved, That the president and secretary of this company be instructed to take such measures as may be necessary, by way
44 of pledging or mortgaging its property for the purpose of indemnifying Wm. R. Morrison, security for the company upon an injunction bond made for the purpose of restraining the collection of a judgment in the St. Clair county circuit court in favor of Henry Holbrook against said company:

Now, therefore, the said Cairo and St. Louis Railroad Company, party of the first part, for and in consideration of the premises, statute, and of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, does hereby grant, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns, the following goods and chattels: Four locomotive engines described as follows—that is to say, locomotive engine No. 4, named Randolph; locomotive engine No. 9, named "Monroe;" locomotive engine No. 19, named "S. S. Taylor," and locomotive engine No. 20, named "W. R. Morrison:"

To have and to hold all and singular the said goods and chattels unto the said party of the second part, his heirs and assigns, forever to and for the use of him, the said party of the second part, and the said Henry R. Payson & Ferdinand E. Canda, & each of them, as hereinafter provided: Provided, nevertheless, That if the said party of the first part shall well and truly discharge all claim held by the said

Henry Holbrook under & by virtue of said injunction bond, by the reversal or satisfaction or compromise of the said judgment mentioned in said injunction bond or otherwise, then this mortgage is to be null and void; but the said party of the first part hereby covenants and agrees to and with the said party of the second part that if he,
45 the said party of the second part, or any other of said sureties shall be compelled to pay any portion of the penalty of said bond, or if the said party of the first part shall sell or assign or attempt to sell or assign any portion of the said goods & chattels, then the said party of the second part, his executors, administrators, or assigns, shall thereupon have the right to take immediate possession of any or all of said property, wherever it may be found, and sell so much thereof as may be necessary to satisfy and pay off any damages that may have legally accrued to said party of the second part or to either of the securities in consequence of default being made in the condition of said bond or in any way by the said party of the second part, or either of said other securities being compelled to pay any portion of the judgment mentioned in said bond; the sale of said property to be wherever the same may be found after four weeks' notice shall be given of the time and place of sale in one daily newspaper published in Cairo, Illinois, and in one daily newspaper in St. Louis, Mo., and in one weekly newspaper published in Belleville, Illinois; and, after selling so much of said property as may be necessary for the purpose aforesaid and paying costs of sale, if any surplus remains the said party of the second part shall pay said surplus to the said party of the first part; and it is hereby expressly stipulated that said goods & chattels may remain in the possessson of said party of the first part until the said party of the second
46 part or some one of said other sureties is compelled to pay some portion of the penalty of said bond or is otherwise damaged by the breach of the condition of said bond; and it is hereby expressly covenanted by said party of the first part to and with said party of the second part that if said bill of complaint mentioned in said injunction bond should not be disposed of in two years from this date the party of the first part will execute and deliver to the party of the second part a new mortgage upon the property herein described and with the same provisions and conditions as are herein contained.

In testimony whereof the said party of the first part has caused this mortgage to be signed by its president & secretary and its corporate seal to be affixed hereto on this 26th June, 1875.

[CORPORATE SEAL.] THE CAIRO & ST. LOUIS RAILROAD CO'Y,
By S. STAATS TAYLOR, *President.*

Attest: S. BROSS, *Sec.*

This mortgage was acknowledged before me by S. S. Taylor, president of the Cairo & St. Louis Railroad Company, the mortgagor, and by F. Bross, the secretary of said company, and entered by me this 26th June, 1875.

Witness my hand and seal this 26th June, 1875.

JOHN H. ROBINSON, *J. P.* [SEAL.]

Filed for record June 28th, 1875.

STATE OF ILLINOIS, *St. Clair County:*

47 I, Charles Becker, clerk of the circuit court and *ex-officio* recorder in and for said county of St. Clair and State of Illinois, do certify the foregoing to be a true and correct copy of mortgage from Cairo and St. Louis R. R. Co. to Wm. R. Morrison as the same appears of record in my office in record book 132, page 637, of said St. Clair county records; and I further certify that I am custodian of said records.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in Belleville, Illinois, this 23d day of March, A. D. 1880.

[L. S.] CHARLES BECKER, *Clerk.*

(Endorsed:) Filed June 30, 1881. J. A. Jones, clerk.

"EXHIBIT 2" to Int'v'g Petition.

In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

THE UNION TRUST COMPANY OF NEW YORK

vs.

THE CAIRO AND ST. LOUIS RAILROAD COMPANY.

To the honorable the judges of the circuit court of the United States in and for the southern district of Illinois, in chancery sitting:

Your petitioner, Henry W. Smithers, unto your honors respectfully represents that by decree of this court rendered in this cause
48 on the sixth day of December, A. D. 1877, he was appointed receiver of the property, effects, &c., of the Cairo & St. Louis Railroad Company, to which decree remaining of record in this court your petitioner asks leave to refer as a part of this his petition; and, having been thus appointed receiver, your petitioner at once entered upon the discharge of his duties as such, and thence hitherto has been acting and now is acting in that capacity.

And your petitioner further represents unto your honors that at the time your petitioner was so appointed as such receiver there were and still are pending in various courts of the States of Illinois and Missouri, and in the Supreme Court of the United States of America, certain suits or legal proceedings in which the said Cairo & St. Louis Railroad Company were and are parties or directly interested; a list of which suits or proceedings, with memoranda concerning the same, is hereto attached, and to which your petitioner begs leave to refer as a part of this petition; each of which causes or proceedings is now pending upon appeal from the judgment or decree of an inferior tribunal, and in each case a proper appeal bond, with security, was given before your petitioner's said appointment as receiver.

And your petitioner shows that such appeal bonds were given by some of the officers of said railroad company, with others as sureties, in order to protect the rolling-stock or other personal property of said railroad company from levy or sale under execution
49 pending the determination of the appeals; in each of which cases execution on the judgment or decree was either levied on personal property of said railroad company or the levy thereof threatened at the time of taking the appeal and giving the bond.

And petitioner shows that in one of the said cases (namely, The Cairo & St. Louis Railroad Company against Henry Holbrook) a bill in chancery was originally filed by said railroad company in the circuit court of St. Clair county, Illinois, to restrain the collection of a judgment against said company for about ten thousand dollars in favor of said Holbrook, and which judgment was claimed by said company to be inequitable and unjust and to have been fraudulently obtained; in which proceedings an injunction was awarded upon a bond, with surety being given, and which bond was given, and the injunction thereupon issued. And petitioner shows that the venue in said cause was changed to the city court of Alton, Illinois, wherein a hearing was had and a decree rendered against said company dismissing the bill; from which decree an appeal was taken by said company to the supreme court of Illinois, the necessary bond, with surety, being given, and which appeal is still pending and undetermined.

And your petitioner shows that the sureties on all said appeal bonds claim, and truly, as far as your petitioner is informed, that they executed such appeal or other bonds in every case at the
50 instance and request of the company and for its benefit solely, having no personal interest whatever in the subject-matter of any of the suits; that they did so relying on the assurances of the company that they should be protected and in the belief that all the property of the company would stand pledged to hold them harmless; that their action has been to the benefit of all parties interested in the property of said railroad company, as, in default of payment, which they were assured the company had not then the ability to make, property of the company would have been sacrificed to meet the demands. Your petitioner therefore states that he desires the special advice and instruction of this court in respect to said several appeal cases, and the prosecution thereof, and in regard to said several bonds, and especially as to whether your petitioner shall protect the said several sureties and save them harmless from or by reason of their obligations under said several and respective bonds in the event of adverse decisions in any or all of said cases or proceedings.

Wherefore your petitioner prays the court to grant him such advice and instruction; and he will ever pray, &c.

H. W. SMITHERS, *Receiver.*

Duly sworn to Dec. 29, 1877.
Filed Feb. 4, 1878.

(Endorsed:) Filed June 30th, A. D. 1881. J. A. Jones, clerk.

51 And afterwards, to wit, on the 19th day of August, in the year last aforesaid (A. D. 1881), came the Union Trust Company of New York and Henry W. Smithers, receiver in said cause, by their solicitors, and filed in the office of the clerk of said court their joint answer to said intervening petition, which answer is in the words and figures following, to wit:

Answer to Interv'g Petition.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the United States Circuit Court. In Equity.

THE UNION TRUST CO. OF N. Y.
vs.
THE CAIRO & ST. LOUIS R. R. Co. *et al*

Foreclosure.

In the Matter of the Intervening Petition of WM. R. MORRISON, Petit'r.

Joint and several answer of the Union Trust Co. of N. Y. and Henry W. Smithers, receiver, to said petition.

These respondents, saving and reserving the benefit of all exception to the said petition (and expressly denying all equity on the face thereof), for answer thereto, or to so much and such parts thereof as they are advised is material for them to make answer unto, answering on information and belief, admit that on the 26th day of Nov., 1872, in the circuit court of St. Clair county, Illinois, one Henry Holbrook recovered a judgment against the C. &
52 St. L. R. R. Co. for the sum of $9,500.00 and costs, but deny that such judgment was recovered for work and labor performed by said Holbrook for said R. R. Co. Further answering, respondents, on like information and belief, admit that on Jan. 3d, 1873, said Holbrook caused an execution to issue upon said judgment, directed to the sheriff of said county to execute, which execution was returned by said sheriff on the 23d of April, 1873, by order of said Holbrook; also, on like information & belief, admit that on the 27th day of October, 1874, said Holbrook caused an *alias* execution to issue upon said judgment, and that said sheriff threatened to levy the same upon the rolling-stock and personal property of said R. R. Co. within said county; admit that said company, believing said judgment to have been fraudulently and wrongfully obtained, had previously and on March 2nd, 1874, filed its bill of complaint in equity in said circuit court against said sheriff and said Holbrook to restrain and enjoin them from proceeding to collect said judgment; admit that such proceedings were afterwards had that on the 30th day of Dec., 1874, while said last-mentioned execution was still in full force, and when said R. R. Co. had locomotives, cars, and other personal property in said county, said R. R. Co. procured a temporary injunction restraining said parties from

proceeding to collect said judgment; but respondents deny that as against this respondent, The Union Trust Co. of N. Y., complainant, or as against the holders of the bonds secured by the mortgage
53 in the bill of complaint in this cause, the execution was a lien upon any such locomotives, cars, or other personal property paramount to the lien of said trust Co. and the holders of such bonds, all such engines, cars, & other personal property then and there being attached to said railroad and belonging thereto, and said R. R. Co. having, long prior to the issue of the said execution or the rendition of said judgment, been covered and embraced in the mortgage or trust deed mentioned and referred to in the bill in the above-entitled cause, and said bonds having been put upon the market and sold to good-faith purchasers for value long before said executions or either thereof were issued, and long before such judgment was rendered, and which mortgage or deed of trust was duly recorded in the offices of the recorders of the several counties into or through which said railroad is or was located long before the rendition of said judgment.

Further answering, respondents admit that afterwards, at the April term, 1875, of said court, the venue of said injunction suit was changed by order of court to the city court of Alton, in the State of Illinois; also admit that in order to procure said injunction said R. R. Co. gave bond, with the petitioner and H. R. Payson & F. E. Canda as sureties thereon, with penalty and condition substantially as stated in said petition, but respondents deny that said Payson and Canda are now insolvent.

54 Further answering, respondents, on information and belief, admit that at the February term, 1877, of said city court of Alton upon the hearing of said suit said bill was dismissed, and that thereupon said R. R. Co. prayed for and obtained the allowance of an appeal from said decree to the supreme court of Illinois, which appeal was afterwards and on the 10th day of April, 1877, perfected, and whereupon the said city court, upon application by said R. R. Co., made an order continuing said injunction in force until the final determination of said appeal; further admit that at the June term, 1879, of said supreme court the decree of said city court was affirmed and said injunction dissolved.

Further answering, respondents, upon information and belief, admit that said Holbrook, at the September term, 1880, of the circuit court of Monroe county, Illinois, in which county the petitioner resides, recovered judgment against said petitioner upon the injunction bond aforesaid for the sum of $13,965.00 and costs.

Further answering, respondents say that they have no knowledge, information, or belief other than as gathered from said petition as to whether or not, on the 26th day of June, 1875, said company, for the purpose of securing said petitioner and other sureties from all liability upon said injunction bond, executed and delivered to said sureties a chattel mortgage, as averred in said petition; hence
55 respondents neither admit nor deny the allegations of the petition in that regard; but respondents submit that, even if said company did execute and deliver such chattel mortgage, still

the same could have no effect and create no lien upon any property therein described paramount to the said lien of this respondent. The Union Trust Company of N. Y. and respondents also submit that even if any such lien was created or at any time existed the same has long since been lost and subordinated to the rights of the Union Trust Company, complainant in this cause, under its mortgage or trust deed mentioned and referred to in the bill of complaint in the above-entitled cause.

Further answering on information and belief, respondents admit that said R. R. Co. used any and all the engines and personal property owned by said company in said year 1875, and thence up to the time of the appointment of the respondent, Henry W. Smithers, as receiver, and that said receiver has continually used the same since said appointment; but whether or not any such engines and property are the same as are mentioned in said petition to have been included in said pretended chattel mortgage respondents have no knowledge, information, or belief, and hence they neither admit nor deny the identity of such engines, cars, and other property.

56 Further answering, respondents admit that said receiver has not paid, and has not been able out of the earnings of said railroad to pay, said judgment so recovered by said Holbrook against said petitioner, and respondents submit that if said receiver had been so able he would not have had any right or authority to pay the same.

Further answering, respondents, upon information and belief, say that said judgment remains wholly unpaid, neither said petitioner nor said railroad company having paid the same or any part thereof, and respondents submit that there is no liability on the part of the receivership in this cause or on the part of the property in the possession of this court in this cause for the payment or discharge of such judgment.

And now, having fully answered, respondents pray to be dismissed, with their reasonable costs, &c., &c.

THE UNION TRUST COMPANY OF NEW YORK &
HENRY W. SMITHERS, *Receiver, etc.*,
By JUDD & WHITEHOUSE,
Sol's & of Counsel for Resp'd'ts.

(Endorsed:) Filed August 19, 1881. J. A. Jones, clerk.

57 And afterwards, to wit, on the 5th day of June, in the year of our Lord one thousand eight hundred and eighty-two, came the said intervening petitioner, by his solicitors, and filed his supplemental intervening petition in said cause; which said supplemental intervening petition is in the words and figures following, to wit:

Supplemental Int'v'g Petition of Wm. R. Morrison.

In the Circuit Court of the United States, Southern District of Illinois.

THE UNION TRUST COMPANY OF NEW YORK

vs.

THE CAIRO AND ST. LOUIS RAILROAD COMPANY and Others.

Supplementary petition to intervening petition of Wm. R. Morrison heretofore filed.

To the hon. judges of said court:

Now comes the said Wm. R. Morrison, and, as a supplement to his intervening petition heretofore filed, by leave of the court first obtained, represents to your honors that since he has filed his intervening petition in this cause, to wit, on the 29th day of May, A. D. 1882, he has paid to said Henry Holbrook the amount of the judgment obtained in the Monroe county circuit court (in the State of Illinois), which judgment is in the said original petition fully described, together with the interest thereon, amounting on said day to the sum of fifteen thousand three hundred and fifty-two
58 dollars and nineteen cents ($15,352.19).

And in consideration of the premises your petitioner prays as he has heretofore in the original petition prayed, and prays that an order may be made requiring the said defendants to the original petition to answer this supplemental petition, and that on the hearing hereof the order may be made that the receiver pay to the said petitioner, Wm. R. Morrison, the said sum of money so paid out by him as aforesaid, with interest thereon, &c. And as in duty bound your petitioner will ever pray, &c.

WM. R. MORRISON.

G. & G. A. KOERNER,
His Solicitors.

(Endorsed:) Filed June 5th, A. D. 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 15th day of June, in the year last aforesaid, came the Union Trust Company of New York and Henry W. Smithers, receiver, &c., by their solicitors, and filed in said cause their joint answer to the said supplemental intervening petition, which answer is in the words and figures following, to wit:

59 *Answer to Supplemental Inter'v'g Petition.*

UNITED STATES OF AMERICA, }
Southern District of Illinois. } ss:

In the Circuit Court of the United States for the said District. In Equity.

THE UNION TRUST COMPANY OF NEW YORK

vs.

THE CAIRO & ST. LOUIS RAILROAD COMPANY *et al.*

Foreclosure.

The joint and several answer of the Union Trust Company of New York, complainant in the above-entitled cause, and of Henry W. Smithers, receiver, etc., appointed in said cause, to the supplementary intervening petition of William R. Morrison, filed in this cause on the 5th day of June, A. D. 1882.

These respondents, now and at all times hereafter, saving and reserving to themselves the benefit of all manner of objection and exception to the said supplementary petition for the many errors, uncertainties, and insufficiencies therein contained (and expressly denying all equity on the face thereof), for answer thereunto, or to so much and to such parts thereof as they are advised by their counsel that it is material for them to answer unto, answering, deny that the said Wm. R. Morrison, intervening petitioner as aforesaid, since he filed his original intervening petition in this cause, or at any other time, has paid to said Henry Holbrook the amount of the judgment alleged to have been obtained in favor of said Holbrook in Monroe county circuit court, Illinois, and deny that he
60 has paid any part thereof, and which judgment is mentioned and referred to in the said original petition; and these respondents deny that said Morrison has paid to said Holbrook any interest on said alleged judgment, and deny that he has made any payment whatever, either on principal or interest, of the said alleged judgment.

And these respondents, further answering, say that heretofore, to wit, on the 16th day of May, A. D. 1881, in and by a decree for payment and sale, &c., rendered by this court in the above-entitled cause, it was, among other things, ordered that all persons having claims or liens against the railroad and property of the Cairo & St. Louis Railroad Company, or against the proceeds of the sale thereof, and not then before this court should file intervening petitions on or before the 1st day of July, A. D. 1881, and that notice of such provision of said decree, signed by the clerk of this court, should be published once a week for four successive weeks — published in each of the cities of East St. Louis, Illinois, and St. Louis, Mo.; and, further answering, these respondents say that after the rendition and entry of the aforesaid order or decree due notice of the rendition and entry of

such decree and of the requirements thereof as aforesaid, signed by the clerk of this court, was published once in each week for four successive weeks prior to the said 1st day of July, A. D. 1881, in the "Evening Chronicle," a daily newspaper published in the
61 city of St. Louis, State of Missouri, and also in the "East St. Louis Herald," a newspaper published in the city of East St. Louis, county of St. Clair, and State of Illinois, and that thereafter and on the 5th day of July, A. D. 1881, a further decree was rendered and entered by this court in the above-entitled cause, wherein and whereby it was ordered, adjudged, and decreed that no claim presented in this cause after the said first day of July, A. D. 1881, should be received or filed in this cause; and that persons who had not, on or before the said first day of July, A. D. 1881, filed their claims in said cause, and all claims not so filed on or before said date, should be, and were thereby, forever debarred and excluded from any and all participation in or benefit from or under the decree for payment and sale aforesaid rendered in this cause, and from the property and assets therein mentioned, and from the proceeds of the sale of said property under such decree.

And, further answering, these respondents say that afterwards and on the 14th day of July, A. D. 1881, all the railroad, property, and assets mentioned or referred to in said decree for payment and sale were sold at public auction, under the requirements of such decree, for payment and sale by the special commissioner appointed in and by said decree of this court to Josiah A. Horsey and Charles J. Canda for the sum of four million dollars; and that afterwards and on the 22d day of December, A. D. 1881, a further decree was rendered by this court directing the said special commissioner forthwith to execute, acknowledge, and deliver a good and sufficient
62 deed of conveyance of the said railroad, property, and assets to the said Josiah A. Horsey and Charles J. Canda, subject, however, to all sums legally due for taxes which were at the time of such sale or of the rendition of such decree a legal lien upon the said property and assets paramount to that of the mortgage or deed of trust in the said decree for payment and sale mentioned and referred to, and subject also to the lien of all receiver's certificates and obligations issued under the order of this court not paid and discharged from cash in the hands of such special commissioner, and also subject to the lien of any and all claims against said railroad, property, and assets which were, at the time of the rendition of the last-mentioned decree, before this court by intervening petitions, and which should be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust.

And afterwards and on the 19th day of January, A. D. 1882, a further decree was rendered by this court in said cause, wherein and whereby it was ordered, adjudged, and decreed that the receiver appointed in this cause execute, acknowledge, and deliver to the said Horsey and Canda a good and sufficient quit-claim deed conveying to them all the real estate, rolling-stock, and personal property of every name and kind purchased or acquired by him, as such

63 receiver, at any time after his appointment as such in this cause, and that said receiver deliver the possession of all such real estate, rolling-stock, and personal property to said Horsey and Canda when the deed aforesaid of the said special commissioner to the said Horsey and Canda should be presented to him and demand made for the surrender of the possession of the said railroad, rolling-stock, personal property, and assets, either by said Horsey and Canda or by their guarantee or guarantees.

And, further answering, these respondents say that afterwards and on the 30th day of January, A. D. 1882, the said receiver, by good and sufficient quit-claim deed, conveyed to said Horsey and Canda all such real estate, rolling-stock, and personal property of every name and kind purchased or acquired by him at any time since his appointment as aforesaid; and that afterwards and on the 31st day of January, A. D. 1882, the said Josiah A. Horsey and Charles J. Canda, joined by their wives, respectively, by good and sufficient deed, conveyed the said Cairo & St. Louis railroad and all the property and assets in connection therewith or belonging thereto to the St. Louis & Cairo Railroad Company, a corporation then organized and existing, and still existing and doing business under the laws of the State of Illinois, which conveyance, however, was so made to said St. Louis & Cairo Railroad Company subject to the liens mentioned and referred to in the aforesaid decree of this court rendered and entered as aforesaid on the said 22d day of December, A. D.
64 1881, and subject to such lien only.

And, further answering, these respondents say that afterwards and on the 1st day of February, A. D. 1882, the said St. Louis & Cairo Railroad Company presented to the said receiver the said conveyance by the said special commissioner to said Horsey and Canda, and also the aforesaid deed from said Horsey and Canda, joined by their wives, to the said St. Louis & Cairo Railroad Company, and demanded of him (said receiver) that he surrender the possession of the said railroad formerly known as the Cairo & St. Louis railroad, and all the property and assets in connection therewith or belonging thereto; and that thereupon, afterwards, and on the same first day of February, A. D. 1882, the said receiver surrendered and delivered to the said St. Louis and Cairo Railroad Company the full and absolute possession and control of the said railroad, and of all the property and assets of every nature and kind in connection therewith or belonging thereto, and which railroad, property, and assets, have from that time hitherto been in the sole and absolute control of the said St. Louis and Cairo Railroad Company, and still are in such possession and control.

And, further answering, respondents say that the said deed so made by said receiver to said Horsey and Canda as aforesaid and the surrender and delivery of the said railroad, property, and assets by said receiver to the said St. Louis & Cairo Railroad Company were,
65 respectively, reported to this court before the making of such deed and the surrender of such possession, and before the filing herein of said supplementary petition of the said William R. Morrison, and which deed and surrender of possession as aforesaid

were by said court fully approved and confirmed; also before the filing of said supplementary petition.

And, further answering, these respondents say that *that* there are no proceeds of the aforesaid sale of said railroad, property, and assets in the hands of said receiver nor are there any assets or funds whatever in his hands out of which any payment could be made to the said petitioner, William R. Morrison, upon his said pretended claim if the same should be allowed; and now, having fully answered, these respondents pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained, etc.

THE UNION TRUST COMPANY OF NEW YORK &
HENRY W. SMITHERS, *Receiver, etc.*,
By JUDD & WHITEHOUSE,
Their Solicitors.

S. C JUDD,
Of Counsel for Respondents.

(Endorsed:) Filed June 15th, A. D. 1882. J. A. Jones, clerk.

66 And theretofore, to wit, on Thursday, the 14th day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-one, the following further proceedings were had in the said foreclosure cause and entered of record in said court, to wit:

Order Referring all Claims to Special Master.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

And now, this cause coming on to be heard upon the matter of the appointment of a special master, and the court having considered the affidavit of William F. Whitehouse filed this day herein, and the matters and things therein contained, and being fully advised in the premises, *now*, upon motion of Messrs. Judd and Whitehouse, solicitors for the said complainant, it is hereby ordered, adjudged, and decreed that Frank H. Jones, Esq., be, and is hereby, appointed special master, to whom shall be referred all the intervening claims and petitions filed in this cause, to take proof and report his conclusions of fact and law thereon for the consideration of this court; such master to give notice to the parties in interest of the time and place where testimony will be taken.

67 And afterwards, to wit, on the 19th day of December, in the year of our Lord one thousand eight hundred and eighty-three, came Frank H. Jones, Esq., special master in said cause, and filed his report in the matter of said intervening petition, which report is in the words and figures following, to wit:

Report of Special Master on Int'v'g Petition of Wm. R. Morrison.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

THE UNION TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE CAIRO & ST. LOUIS RAILROAD COMPANY *et al.*, Defendants. } In Equity.

In the Matter of the Intervening Petition of WILLIAM R. MORRISON.

This is a claim of William R. Morrison, Waterloo, Illinois, against the Cairo & St. Louis Railroad Company, begun by intervening petition filed June 30, 1881; amount $15,352.19.

The facts, as set forth in said petition, are these: One Henry Holbrook, on November 26th, A. D. 1872, at a term of the circuit court of St. Clair county, State of Illinois, recovered a judgment against said Cairo & St. Louis Railroad Company for the sum of nine thousand five hundred dollars and costs of suit; that on January 3rd, A. D. 1873, said Holbrook caused execution to issue
68 upon said judgment, which said execution was returned by the sheriff by order of said Holbrook's attorneys on April 30th, 1873; that on October 27th, 1874, said Holbrook caused an *alias* execution to issue upon said judgment to said sheriff to execute. Said sheriff threatened to levy the said execution upon rolling-stock and personal property of said railroad company within the said county of St. Clair; that said company, believing said judgment to have been fraudulently and wrongfully obtained by said Holbrook, had, previous to the issuance of said *alias* execution, caused its bill in equity to be filed in said St. Clair circuit court against said Holbrook and said sheriff to restrain & enjoin said Holbrook and all of his agents and attorneys from proceeding in any manner to collect said judgment or any part thereof.

On December 30th, 1874, said company procured a temporary injunction restraining said Holbrook, his agents and attorneys, and said sheriff in accordance with the prayer of said bill; that afterwards, at the April term, A. D. 1875, of said circuit court, the venue of said suit, wherein injunction had been granted, was changed to the city court of Alton, State of Illinois; that, in order to procure said injunction, it was necessary for said railroad company to give its injunction bond in the sum of nineteen thousand dollars to said Henry Holbrook, his executors, administrators, & assigns.

Said bond, as far as the record shows, was, as to conditions,
69 like the ordinary injunction bond; that Mr. Morrison, this petitioner, at the request of said railroad company, became one of its sureties on said bond, together with Henry R. Payson and Ferdinand E. Canda, both of whom are insolvent.

That at the February term, A. D. 1877, of said city court of Alton said court dismissed said bill. Thereupon said railway company prayed an appeal from said decree dismissing said bill to the supreme court of said State, which appeal was duly perfected April

10th, 1877, and an order entered by said city court continuing said injunction in force until the final determination of said appeal; that at the June term, A. D. 1879, of said supreme court said decree of said city court was in all things affirmed, & said appeal finally determined and said injunction dissolved.

That said Henry Holbrook, at the September term, A. D. 1880, of the circuit court within and for the county of Monroe, State of Illinois, where petitioner resides and owns property subject to execution, recovered a judgment against this petitioner upon said injunction bond for the sum of thirteen thousand nine hundred & sixty-five dollars & costs of suit.

That on June 26th, A. D. 1875, said company executed to said petitioner & Payson and Canda, sureties aforesaid, a certain chattel mortgage and delivered the same to them. A copy of said mortgage is filed with and made a part of said petition.

That Henry W. Smithers, receiver of said railroad, did, on
70 February 4th, 1878, file a certain intervening petition in this cause asking leave of this honorable court to protect said sureties on said injunction bond against the consequences of the same; whereupon an order was entered. Petitioner states that said receiver, since his appointment, has not out of the earnings of the said road — to pay said judgment & thus protect sureties; wherefore prays that a decree may be entered fully protecting said petitioner from the consequences of said judgment recovered against him.

No place in said petition does said petitioner Morrison declare or say he paid said judgment against him or any part of the same.

August 19th, A. D. 1881.—Answer of the Union Trust Company of New York and of the receiver, by Judd & Whitehouse, sol'rs & of counsel for respondents, filed, admitting, in effect, upon information and belief, everything in said petition stated save and except the lien of said execution and *alias* execution and chattel mortgage to said sureties on said property of said railroad, and charging, upon information and belief, that said judgment has not been paid by said railroad company or by said sureties or either of them.

June 5th, A. D. 1882.—Said petitioner filed a supplemental petition as a supplement to his intervening petition heretofore filed, and says—

That since filing his intervening petition he paid, on, to
71 wit, May 29th, A. D. 1883, to said Henry Holbrook the amount of the judgment obtained against him, as set forth in this report, which, with principal and interest, amounted to fifteen thousand three hundred and fifty-two $\frac{19}{100}$ ($15,352.19) dollars, and prays the said receiver be ordered to pay said sum to him.

June 15th, A. D. 1882.—The Union Trust Company of New York & Henry W. Smithers, said receiver, file their joint & several answer to said supplemental petition, wherein they deny payment of said judgment by said Morrison, as set forth in said supplemental petition, or any part of the same, and further set up as a bar to said claim certain decrees and orders entered by this honorable court at divers times prior to said supplemental petition, all of which will fully appear by reference to said answer.

Issues being made up, the following — offered in evidence on the part of petitioner, represented by G. A. Koerner, Esq., of Belleville, Ills:

1. Deposition of Charles W. Thomas, Esq., of Belleville, Ills., taken by consent of parties before M. M. Bartholomew, special commissioner, in St. Louis, Mo., on May 25th, A. D. 1883.

2. Order as to protecting sureties entered at the instance of Henry W. Smithers, said receiver, on, to wit, February —, A. D. 1878, (objected to by Mr. Judd, on behalf of the Union Trust Co. & receiver, as incompetent).

72 3. It is admitted by both parties that said order as to sureties did protect some—Rosborough and E. B. Pellet.

On the part of respondents and said receiver, S. Corning Judd offered the following in evidence:

The decree entered in this cause May 16th, 1881.

Do. do. do. July 5, 1881.

Do. do. do. December 22d, 1881.

Do. do. do. January 19th, 1882.

The sale of said railroad and all its property on July 14th, A. D. 1881, by special commissioners appointed by this court to Josiah A. Horsey and Charles J. Canda.

The deed of said special commissioners to said Horsey & Canda.

The deed of said receiver to said Horsey & Canda.

The deed of said Horsey & Canda & wives conveying the said Cairo & St. Louis railroad and all the property and assets connected therewith to St. Louis & Cairo Railroad Company.

The surrender of possession of said road formerly known as the Cairo & St. Louis railroad and all the property and assets connected therewith by said receiver to said St. Louis & Cairo Railroad Company on February 1st, A. D. 1882.

2. Counsel for petitioner admits, as far as relevant, the averments in the answers of said receiver and the Union Trust Company of New York, except as to the denial of payment of the said sum of money by Mr. Morrison, the petitioner.

3. Offers the deposition of William R. Morrison, the peti-

73 tioner, taken on behalf of the Union Trust Company of New York and of the said receiver by consent of parties before M. M. Bartholomew, special commissioner, in St. Louis, Mo., May 25th, A. D. 1883.

4. The evidence of Mr. G. A. Koerner, solicitor for petitioner, taken by your special master herein on the 19th day of December, A. D. 1883, the day of the argument of the case before him, and at the instance of the Union Trust Company of New York and said receiver, represented by S. Corning Judd, Esq.

There is, as your special master understands the case, but one issue of fact—*i. e.*, did William R. Morrison, one of the sureties on said injunction bond and petitioner in this suit, pay the said judgment obtained against him on said bond by said Henry Holbrook?

Your master appointed herein is of the opinion that the testimony shows a payment by Mr. Morrison of said judgment to the amount

of fifteen thousand three hundred and fifty-two dollars and nineteen cents.

Mr. Charles W. Thomas, attorney for said Holbrook, testifies as to the recovery of a judgment by said Holbrook against said Morrison in the Monroe circuit court, September term, 1880, and files with his deposition a copy of the declaration in said case.

He further testifies (see page 1 dep.) that said judgment was paid by said Morrison to the amount of fifteen thousand three hundred and fifty-two dollars and nineteen cents, amount of principal
74 and interest of said judgment, by said Morrison giving his personal check on the Belleville Savings Bank, and upon which he got the money from the bank aforesaid.

He further testifies, upon his information and belief, that said Morrison borrowed this money of said bank on his promissory note.

He further testifies there was no collusion between said Morrison or his attorneys and said Holbrook or himself, or any arrangement by which this was not a *bona fide* transaction. (See page 2 dep.) In all these things Mr. Thomas is corroborated by Mr. G. A. Koerner and Mr. Wm. R. Morrison, the former attorney for the latter, the petitioner, and both the witnesses of the said Union Trust Co. of New York and said receiver. Mr. Koerner advised his client, the petitioner (see page 1 dep.), to make this payment to Holbrook, as he, Holbrook, had a lien on his property and would sell the same; and he further testifies that petitioner's property, although mortgaged, was still enough to pay off all other indebtedness and a part of this if put up for sale. If, then, there was no collusion, as all the witnesses testify there was not, Mr. Morrison's liability to the bank on his note, his payment by check on said bank by which Mr. Thomas received the money, the receipt in full payment by said Holbrook to said petitioner, and satisfaction of record of said judgment is surely a payment of said judgment by said Morrison, and brings this case within the former rulings of this court, as
75 your master understands them, in the cases of Green B. Raum *vs.* Cairo & Vincennes R. R. Co. and E. B. Pellett and —— Rosborough *vs.* The Cairo & St. Louis R. R. Co., in all of which petitioners were sureties for said defendant companies and had actually paid money as said sureties, and being within said rulings, petitioner's claim would be good, in the opinion of your master, but for the questions of law that enter into the case.

The supplemental petition avers and Mr. Thomas so testifies and said receipt so shows that the payment by said Morrison aforesaid was made on May 29th, 1882.

This date of payment is, in the opinion of your special master herein, the vital point in the legal consideration of this claim.

To place himself within the said rulings of this court a surety must have paid the debt before he can have any legal claim on his principal.

On May the 16th, A. D. 1881, in the decree for payment and sale, &c., entered in this case, it was provided, among other things, "that all persons having claims or liens against the said railroad and property or against the proceeds of the sale thereof, and not now before this court, shall file intervening petitions on or before the first

day of July, 1881, and a notice of this provision of this decree, signed by the clerk of this court, shall be published once a week for four successive weeks in a newspaper published in each of the cities of East St. Louis, Illinois, and St. Louis, Missouri."

And on July 5th, 1881, a further decree was entered in this
76 cause, wherein it was found that the said last decree as to publishing notice of said last day of filing by said clerk was complied with, and it was "ordered, adjudged, and decreed that no claim presented herein after the said first day of July, A. D. 1881, shall be received or filed in this cause, and all persons who have not on or before said first day of July, A. D. 1871, filed their claims herein, and all claims not so filed on or before said date, shall be, and hereby are, forever debarred and excluded from any and all participation in or benefit from or under the decree in this cause, or from the property and assets therein mentioned, or from the proceeds of the sale of such property under said decree."

And further, on July 14th, A. D. 1881, said railroad, and all its property and assets, was sold at public auction, under said decree of May 16th, 1881, by the special commissioners appointed for that purpose, and said special commissioners reported the same to the court, which report, on December 22d, A. D. 1881, was by a decree entered on that day confirmed, and it was ordered and decreed that John A. Jones, special commissioner, "execute, acknowledge, & deliver forthwith a good and sufficient deed of conveyance of the said railroad, property, and assets to the purchasers at said sale, said railroad, property, and assets to be conveyed and held subject to all sums legally due for taxes which were at the time of such sale or are now an absolute legal lien upon the said property and assets, &c., &c.," and also subject "to the lien of any and all claims
77 against the said railroad, property, and assets which are now before this court by intervening petitions, and which shall be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust."

And further, on January 19th, A. D. 1882, a further decree was entered in this cause, wherein the receiver, Henry W. Smithers, was ordered to execute, acknowledge, & deliver to said purchasers a good and sufficient deed of quitclaim of said railroad, property, and assets, and deliver possession of said railroad, property, and assets, &c., whenever said deed of said commissioners to said purchasers shall be presented to him and demand made for said property, railroad, rolling-stock, personal property, & assets by said purchasers; and by the report of said receiver, Henry W. Smithers, filed April 17th, 1882, it is made to appear that, in compliance with said decree of January 19th, 1882, said receiver did make said deed on January 30th, 1882, and on January 31st, 1882, in compliance with said decree of January 19th, 1882, did deliver to the assignees, the St. Louis & Cairo Railroad Company, of the said purchasers the railroad formerly known as the Cairo and St. Louis railroad, with its personal property, rolling property, assets, &c.

It further appears to your master that said St. Louis & Cairo R. R. Co. did, on said 31st day of January, A. D. 1882, take possession

of said railroad, assets, &c., and ever since has had possession, use, & control of the same.

78 All of said decrees, reports, and deed and deliveries were entered, filed, and made before said supplemental petition was filed, June 5th, 1882. The intervening petition was filed June 30th, 1881, just one day before the time for filing expired.

In said petition (intervening) last named no legal cause of action, under the rulings of this court, against said property or fund in court is made out.

It sets up the facts of the injunction, injunction bond, surety, dismissal of bill for injunction, and the judgment against Morrison on said bond, but it nowhere avers payment by Morrison. The supplemental petition filed June 5th, 1882, nearly a year after the barring and excludatory orders affecting claims became effective and after these said decrees as to the sale and delivery were entered, does aver that said Morrison did pay said judgment obtained against him on said bond.

The question of law presented is—

Do the excludatory orders, the purchase and delivery of said road & property, bar the claim as set up in said supplementary bill based on new facts and on facts on which alone petitioner could recover and filed, as it was, after said decrees and sale became effective, or does said supplemental petition reach back and become a part of said intervening petition filed in time and take, as it were, the filing of said intervening petition?

79 Is, in short, the supplemental petition based upon new facts and upon which alone petitioner has a legal claim to be regarded as a new petition and new claim, in fact, or does it become a part of the original intervening petition, which was not a good cause of action, and make it good?

Your special master herein is of the opinion it is in substance a new petition, and as such is barred by said excludatory decrees, and by the sale, purchase, and delivery of said railroad property and assets.

As to the supplemental petition being a new cause of action, and not a part of the intervening petition, your master is referred to the following decisions, which serve to fully sustain his view:

2 Daniel Ch. Pr., *1515 note (1).
Milner *vs.* Milner, 2 Edw. Ch., 114.
Pinch *vs.* Anthony, 10 Allen, 477.
Storey Equity Pleading, 339.
Vaughn *vs.* Vaughn, 30 Ala., 330.
" " " " 334.
Godfrey *vs.* Tucker, 33 Beav., 280.
Byrne *vs.* Byrne, 1 Connor & Lawson, 189, 198.
Att'y Gen'l *vs.* Corp'c'n, 3 De G., J. & S., No. 650.
Beardmore *vs.* Gregory, 2 H. & M., 496.
1 Barb, Ch. Pr., 365.
Dunphy *vs.* Riddle, 86 Ills., 22–256.
Crowe *vs.* Nagle *et al.*, 86 Ills., 437.
Clark *vs.* Manning, 4 Bradwell, 649.
" " " 95 Ills., 580.
McGraw *vs.* Bayard, 96 Ills., 146.

80 Nor does the decree entered under the petition of said receiver filed February 4th, 1878, asking leave of this court to protect sureties, in the opinion of your master, have any bearing on this case to affect the finding of your master already made.

Said decree only orders said receiver to protect any and all sureties that in his discretion may need protection, and to protect in such a way as in his discretion may seem proper. Said decree is a part of the record of this case. It is purely of a discretionary character and could only have meant that all sureties should be protected as, under the rulings of this court and in the discretion of the said receiver, were entitled to protection. Under the intervening petition, not having paid the surety debt, and hence having no legal cause of action, said petitioner was not entitled to protection, as this honorable court has solemnly decreed the debt must first be paid.

To enforce protection under the supplemental petition filed almost a year after the barring & limiting orders became effective would make a mere discretionary decree overturn and annul three or more solemn and positive excludatory decrees. I don't believe this honorable court so intended.

Respectfully submitted,

FRANK H. JONES,
Special Master.

(Endorsed:) Filed December 19, 1883. J. A. Jones, clerk.

81 *Testimony in the Matter of Intervening Petition of William R. Morrison.*

a. Deposition of G. A. Koerner.

Mr. G. A. Koerner, attorney for petitioner, being first duly sworn by your special master herein, Frank H. Jones, testified as follows, part in narrative and upon questions and answers:

I have heard the deposition of Wm. R. Morrison in this case read and can say I know something of the transactions mentioned therein. I know something about the negotiations and payment of money by Wm. R. Morrison, mentioned therein. Mr. Morrison to some extent made those negotiations. I advised Mr. Morrison to make the payment. I was not satisfied in my mind he would be protected in the liability he had undertaken as much as if he'd paid the money, and I knew the money was bound to be made out of him, as his property was good for at least some of it.

Col. Morrison did state in his deposition that his property was mortgaged, but I knew the property was worth a great deal more than the amount of the mortgage.

I think I suggested the borrowing of the money by him. I don't remember whether he had anything to do with the negotiations and payment of money other than signing the note. The money was borrowed upon my endorsement and my father's, perhaps. If
82 anybody else signed the notes I do not know it. The money was borrowed of the Belleville Savings Bank; don't remember for how long. I don't know whether it has been paid by Col. Morrison or anybody else. Henry Holbrook and his attorney did

not have anything to do with it, as far as I know it. I would not say they had nothing to do with it, as I know they talked it over with Morrison. Mr. Thomas represented Holbrook as attorney in everything, as far as I know. I don't know of any arrangement or understanding between Mr. Morrison and Mr. Holbrook or Mr. Holbrook's attorney as to Mr. Morrison being protected against the payment of this note or as to the sureties being protected, provided this suit fails.

Question by Mr. JUDD, counsel for Union Trust Co. of New York and the receiver:

1. Let me ask you, Mr. Koerner, whether this transaction of the negotiation of this money upon Col. Morrison's note referred to and the payment of the same on the Holbrook judgment is one of entire good faith and without any understanding, directly or indirectly, relative to the protection of Col. Morrison by or through Holbrook or his solicitor or attorney, regardless of the result of this proceeding?

Answer. I know that Col. Morrison has borrowed that money, and either has paid it or got to pay it regardless of the result of this suit.

Int. 2. Is there any arrangement or understanding, directly
83 or indirectly, by which Col. Morrison, the petitioner, or his surety or sureties, are to be refunded for the payment of this Holbrook judgment, or any part thereof, in case of failure to recover in this proceeding?

Ans. I know of none.

UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss:*

In the Circuit Court of the United States in and for said District.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD COMPANY *et al.*

In the Matter of the Intervening Petition of WILLIAM R. MORRISON.

Depositions of C. W. Thomas, taken on the part of the intervening petitioner, and William R. Morrison, taken on the part of the Union Trust Company and of the receiver of the Cairo & St. Louis Railroad Company, by consent of parties, before M. M. Bartholomew, special commissioner, at the office of the St. Louis & Cairo Railroad Company, in St. Louis, Mo., on the 25th day of May, A. D. 1883, the intervening petitioner being represented by G. A. Koerner, and the Union Trust Company and others by S. Corning Judd.

84 *b. Deposition of C. W. Thomas.*

C. W. THOMAS, being duly sworn, testified as follows:

My name is C. W. Thomas; am a practicing attorney, and have been since 1866.

Q. State whether you had any connection with the case of Henry Holbrook against William R. Morrison, in the circuit court of Monroe county, at the September term, 1880.

A. Yes, sir; I was the attorney of record for Mr. Holbrook in that case.

Q. State whether this is a copy of the declaration which was filed in that case.

A. This paper which is handed to me, and marked "Exhibit one" to my testimony, contains a copy of the declaration in that case, and is the receipt given by me to Colonel Morrison for the amount of the judgment rendered in that case.

Q. Was there a judgment obtained in that case by Mr. Holbrook against Mr. Morrison, as recited in the receipt?

(Mr. Judd objects to parol proof of judgment.)

A. Yes, sir.

Q. State whether Mr. Morrison paid that judgment.

A. Mr. Morrison paid that judgment to me on the 29th day of May, 1882, and the amount he paid to me was fifteen thousand three hundred fifty-two dollars and nineteen cents, the
85 amount of principal and interest of that judgment on that day, for which I gave him a receipt, which properly and correctly recites the facts, and which has been marked an exhibit to my testimony.

Q. That money was received by you on behalf of whom?

A. That money was paid to me by Colonel Morrison, as the attorney of Henry Holbrook, and by me paid to him, and subsequently the judgment against Colonel Morrison on which this money was paid was by me satisfied of record in Monroe county, where it was rendered.

Cross-examination:

Mr. JUDD: When do you say this money was paid?

A. On the 29th day of May, 1882, according to the memorandum I have here, which is taken from my books.

Q. Do I understand you to say that Colonel Morrison, the defendant in that case, paid you the money?

A. He actually paid me the money; yes, sir.

Q. Was it his own money?

A. It was his own money.

Q. Furnished by himself and by nobody else?

A. Furnished by himself and nobody else, as I understood
86 it. If anybody else furnished it I did not know it.

Q. This payment, I understand you to say, as far as you know, was not a collusive payment?

A. It was not a collusive payment.

Q. As far as you know?

A. I know enough to know that it was not. I got Colonel Morrison's check for it, and went to the bank and got the money.

Q. Then he paid you a check and not the money?

A. I got the money on the check.

Q. On what bank was the check drawn?

A. The check was drawn on the Belleville Savings Bank.

Q. That was before the amended or supplemental petition was filed in this case on behalf of William R. Morrison?

A. I do not know whether it was or not; I simply know the date. I do not remember the date of the filing of the petition. My impression is it was previous to the filing of that petition, although I am not sure of it.

Q. And you do not know what arrangement was made as to the raising of the money?

A. I know that Colonel Morrison borrowed the money.

Q. Of whom?

87 A. I think he borrowed it at the bank.

Q. Without any procurement of Holbrook, or Holbrook's attorneys?

A. I could not say it was without any procurement; I advised him to pay the money and he consented to do it. I had a lien on all his property in Monroe county, and I told him unless some steps were taken to pay it I would sell it. I further advised him, as a friend, that I thought that inasmuch as the circuit court had already allowed claims of that kind that his would also be allowed if he should make the payment actually and in good faith.

(Mr. Judd objects to all that part of the answer not responsive to the question.)

c. Deposition of Wm. R. Morrison.

WILLIAM R. MORRISON, sworn on the part of the defendants, testified as follows:

My name is William R. Morrison; I am 57 years of age; I am a lawyer by profession, and my residence is in Waterloo, Monroe county; I am the petitioner in this case.

Q. It is claimed that a judgment was rendered against you in favor of Henry Holbrook in the circuit court of Monroe county at the September term, 1880. Do you know about that judgment?

A. Yes, sir; I know the judgment was rendered.

88 Q. State whether that has been paid; and, if so, whether you paid it.

A. I made what was called a payment; I did not pay money, but I gave a note on which my attorney said he could get the money, and gave a check for the money. Afterwards the attorney for the other party said he was paid and entered the judgment satisfied.

Q. Who was your attorney who told you that?

A. Mr. Koerner.

Q. What Koerner?

A. I think I talked with both on the subject, but the most of the conversation was with the young gentleman, G. A. Koerner.

Q. Did you make any negotiations yourself; did you raise the money by negotiations yourself?

A. No, sir.

Q. State the transaction, as near as you can, giving dates, &c.

A. About a year ago, in conversation on this subject with the two Koerners, who had been attending to this case for me before the United States court, G. and G. A. Koerner, I asked about the payment, and they said they did not know what would be the final determination unless I paid the debt. I forget whether they
89 were together all the time. I said to them I had not the money, and they said that I could raise the money on a note, and my answer was that that would involve somebody; that I was not able to pay now; that I had some other little debts, and they said that they could raise the money on my note. They were so well satisfied that the money would be finally paid back to me that they were willing to make such arrangements by way of security on the note as would get the money, and if I would make the note they would undertake it, and I made the note and they were to negotiate it, and I made a draft for the money and delivered it to them as my attorneys to make the adjustment, to settle it; I think the young gentleman told me that they had done so, and Mr. Thomas, who was the attorney for Holbrook, came to our town and entered the judgment satisfied.

Q. Do you know whether the money was raised on your responsibility or on that of somebody else?

A. I was told that they used that note, but I suppose they would not have raised it on my note without some assurances from those gentlemen. They had signed notes for me before. When I gave security for money I usually applied to them; they were in the habit of doing it, and I had given this matter in their charge;
90 it had cost me a good deal of money one time and another, and they were about the only people that had worked for me for nothing so far—I expect to pay them for it some time—and I trusted the matter to them, and that is all I know about it.

Q. You do not know how the money came, nor anything about it?

A. No, sir; except they told me that I got it on that note; that they put themselves in some responsibility about it by way of security or guaranty. I do not know which it was.

Q. Was there any arrangement made with you by which you were to be in any way protected against the note?

A. No, sir.

Q. Will you state your financial condition at that time?

A. Well, I was embarrassed; pretty much all the property I own besides the home I live in is mortgaged, but not to the extent of its value; I suppose if somebody would take my property and would turn it into money the most of this debt could be made.

Q. Was that the condition at that time?

A. Yes, sir.

91 *d.* EXHIBIT 1 to Deposition of C. W. Thomas.

Henry Holbrook, the plaintiff, by Charles W. Thomas, his attorney, complains of William R. Morrison, the defendant, of a plea of debt, that said defendant render to said plaintiff the sum of nine-

teen thousand dollars, which he owes to and unjustly detains from him:

For that whereas the Cairo and St. Louis Railroad Company on, to wit, the 24th day of November, 1874, exhibited in the circuit court of the county of St. Clair, in said State, on the chancery side thereof, its bill of complaint against the said Holbrook, and thereby prayed, among other things, for an injunction to restrain said Holbrook, his counsel, agents, and assigns, from in any manner collecting from or enforcing, by execution or otherwise, against said Cairo and St. Louis Railroad Company a certain judgment for nine thousand five hundred dollars and cost of suit, recovered by said Holbrook against said company at the October term, A. D. 1872, of the said St. Clair circuit court, to wit, on the 26th day of November, A. D. 1872, and upon examination of said bill the Hon. Amos Watts, one of the judges at that time of the 23rd judicial circuit of said State, then and there ordered that a writ of injunction should issue according to said prayer upon the said company's giving bond and security as required by the order of said judge granting said injunction; and thereupon, in pursuance of said order, the said Cairo and St. Louis Railroad Company gave bond as required by said order, with Henry R. Payson, Ferdinand E. Canda, and the defendant, William R. Morrison, as sureties therein, and on
92 that occasion they, the said Cairo and St. Louis Railroad Company, Henry R. Payson, Ferdinand E. Canda, and the said William R. Morrison, by writing obligatory, bearing date of November 24th, A. D. 1874, jointly and severally acknowledged themselves to be held and firmly bound unto the said Henry Holbrook in the sum of nineteen thousand dollars above described, to be paid to him, the said Henry Holbrook, his executors, administrators, and assigns, upon the condition, nevertheless, that if the said Cairo and St. Louis Railroad Company, Henry R. Payson, Ferdinand E. Canda, and William R. Morrison, their executors or administrators, or any of them, should and did well and truly pay or cause to be paid to the said Henry Holbrook, his executors, administrators, or assigns, moneys and costs due to the said Holbook on the said judgment, and also all such costs and damages as shall be awarded against the said company in case the said injunction should be dissolved, or for wrongfully suing out the said injunction, then the said writing obligatory was to be void; otherwise to be and remain in full force and virtue, as by the writing obligatory will more fully appear; and thereupon there issued then and there out of the said circuit court of the said county of St. Clair a writ of injunction in that behalf, whereby the people of the said State of Illinois commanded and enjoined the said Holbrook and his counsel, agents, and assigns, to desist from in any manner collecting from or enforcing, by execution or otherwise, against the said company the said judgment until the further order of the
93 said St. Clair circuit court in the premises, which writ was then and there delivered to one Jacob May, sheriff of the county of Washington, in said State, where said plaintiff then resided, to be executed, and to be by him, the said sheriff, returned

into the said St. Clair circuit court, at the then next term thereof, in due form of law; and thereupon the said sheriff, on the 30th day of December, A. D. 1874, duly served the said writ upon the said plaintiff by delivering to him a true copy of the same; and the plaintiff in fact says that such proceedings were thereupon had in that cause that afterwards, to wit, at the February term, A. D. 1877, of the city court of Alton, in said State, to which court the venue of said cause had, by the judgment and consideration of the said circuit court of the said county of St. Clair been theretofore duly changed, to wit, on the 27th day of February, A. D. 1877, it was adjudged and decreed by the said city court that the said injunction should be dissolved, and that the said company, the complainant in said suit, should pay the costs thereof; and thereupon the said Cairo and St. Louis Railroad Company prayed and obtained an appeal from the said decree of the said city court dissolving said injunction to the supreme court of said State, which appeal was duly perfected in pursuance of the said order of the said city court in that behalf, and the said injunction was, by the judgment and consideration of the said city court, to wit, on the said 27th day of February, A. D. 1877, continued in force
94 until said appeal should be determined in the said supreme court.

And the plaintiff avers that the said decree of the said city court was, by the said supreme court, at its June term, A. D. 1879, to wit, on the 18th day of June, A. D. 1879, in all things affirmed, by means whereof the said injunction became and was finally dissolved; nevertheless neither the said Cairo and St. Louis Railroad Company nor the said Payson, Canda, or Morrison or either of them, or any one of them, or either of them, has paid plaintiff the said judgment or any part thereof, but the same remains wholly unpaid, whereby an action has accrued to the plaintiff to demand of the said defendant Morrison the said sum of nineteen thousand dollars above demanded; yet the said defendant has not paid to the said plaintiff the said sum of money or any part thereof, but refuses so to do, to the damage of the said plaintiff of nineteen thousand dollars, and therefore he brings his suit, etc.

By CHARLES W. THOMAS,
Plaintiff's Attorney.

Receipt for Amount of Judgment Obtained against Wm. R. Morrison.

BELLEVILLE, ILLS., *May 29th*, 1882.

Received of William R. Morrison fifteen thousand three hundred and fifty-two dollars and nineteen cents in full payment and satisfaction of a certain judgment in favor of Henry Holbrook
95 and against the said Morrison for the sum of $13,965.00, rendered in the circuit court within and for the county of Monroe and State of Illinois, at its regular September term, A. D. 1880, on the 30th day of September, A. D. 1880, the said judgment being rendered in a certain action of debt wherein said Holbrook was plaintiff and said Morrison was defendant, for a more particular description of which reference is made to a copy of the declaration

in said action attached hereto and made part of this receipt and acknowledgment, the said action being the same mentioned in the intervening petition of said Morrison on file in a certain suit in equity now pending in the circuit court of the United States for the southern district of Illinois, wherein The Union Trust Company of New York is complainant and The Cairo and St. Louis Railroad Company and others are defendants.

CHARLES W. THOMAS,
Attorney of Record for Henry Holbrook.

And thereupon, to wit, on the said 19th day of December, and in the year last aforesaid (A. D. 1883), came William R. Morrison, the intervening petition aforesaid, by his solicitors, and filed in said cause his exceptions to the said report of special master, which
96 exceptions are in the words and figures following, to wit:

Exceptions to Report of Special Master.

In the Circuit Court of the United States, Southern District of Illinois.

THE UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO & ST. LOUIS R. R. CO.

In Re Intervening Petition of W. R. MORRISON.

Now comes the said Wm. R. Morrison, by his attorneys, and excepts to the report of the special master, Frank H. Jones, herein filed, and says that said master erred in the conclusion that because the said Morrison at the time he filed his intervening petition had not paid the judgment obtained by Holbrook, he is not entitled to be protected, while had he so paid it he should be.

And said petitioner says there is neither in law nor in equity any ground for such distinction as drawn by the master in his said report, and he prays that the said report be set aside & decree entered, as prayed for in the original & amended petition, &c.

G. & G. A. KOERNER,
For Petitioner, W. R. Morrison.

(Endorsed:) Filed December 19, 1883. J. A. Jones, clerk.

97 And afterwards, to wit, on Monday the 5th day of May, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, the following further proceedings were had in said cause in the matter of said intervening petition, and entered of record in said court, to wit:

Decree Sustaining Exception and Allowing Claim.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY
et al.
5187. In Chancery.

In the Matter of the Intervening Petition of WILLIAM R. MORRISON, filed June 30, 1881, and the supplemental petition thereto, filed June 5, 1882.

And now, on this 5th day of May, 1884, come again the parties to the intervening petition, by their counsel, and submit to the court the exceptions of the petitioner to the report of the special master, and the court having heard and considered the same, and being sufficiently advised in the premises, doth now order and decree, the circuit and district judge concurring, that the exceptions be sustained.

And the questions arising on said intervening petition now coming on to be heard on the pleadings and proofs and the
98 report of the special master, and the court having heard and considered the same, and being sufficiently advised in the premises, doth find, order, and decree, the circuit and district judge concurring, that there is now due to the petitioner the sum of fifteen thousand three hundred and fifty-two dollars and nineteen cents and interest thereon from the 20th day of May, 1882, and that he has an equitable lien for the payment thereof against the property embraced in the principal cause and which was sold under the decree of foreclosure therein on the 14th day of July, 1881, to Josiah A. Horsey and Charles J. Canda and conveyed to them by the master in chancery of this court and special commissioner on the 22d of December, 1881, and was by them afterwards transferred to the St. Louis and Cairo Railroad Company as now organized and existing.

And the court doth further order and decree, the circuit and district judge concurring, that in default of payment of the aforesaid sum and interest thereon, on or before the first Monday of September next, the petitioner have leave to apply to this court for a further order and decree respecting the payment thereof.

And afterwards, to wit, on the 7th day of May, in the year last aforesaid, came the St. Louis and Cairo Railroad Company,
99 by its solicitor, and filed in the office of the clerk of said court its petition in said cause praying to be made party defendant to said intervening petition, &c., which said petition is in the words and figures following, to wit:

Petition of St. Louis & Cairo R. R. Co. to be Made Party Defendant, &c.

UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss:*

In the Circuit Court of the United States in and for said District. In Equity.

THE UNION TRUST COMPANY OF NEW YORK

vs.

THE CAIRO & ST. LOUIS RAILROAD COMPANY *et al.*

Foreclosure.

To the hon. the judges of said court, in chancery sitting:

Your petitioner, The St. Louis & Cairo Railroad Company, unto your honors respectfully represents that your petitioner is the grantee of Josiah A. Horsey and Charles J. Canda, the purchasers of the railroad and property sold under the decree for payment and sale rendered in the above-entitled cause and conveyed to them by virtue of the decrees of this court in said cause rendered December 22, 1881, and January 19, 1882; that said railroad and property was conveyed to your petitioner by said Horsey and Canda, joined by their wives, by deed executed and delivered on the 31st day of January, 1882, subject to the liens and conditions mentioned and referred to in the said decree of this court, entered as aforesaid on the said 22d day of December, A. D. 1881; that your petitioner thereafter, and on the 1st day of February, A. D. 1882, received and entered into possession of railroad and property, and has ever since continued in possession and control thereof, and now is in such possession and control, and is the owner of such railroad and property subject to the liens provided for in said decree of December 22d, A. D. 1881; that on the 5th day of May, A. D. 1884, a decree was entered in this cause in the matter of the intervening petition of William R. Morrison, filed June 30th, 1881, and the supplemental petition thereto, filed June 5th 1882, which decree provides for a lien on said railroad and property; hence your petitioner is directly interested and concerned in the matter of such decree, which requires the payment to said Morrison of the sum of fifteen thousand three hundred and fifty-two dollars and nineteen cents ($15,352.19), and interest thereon from the 20th day of May, 1882, on or before the first Monday of September, 1884.

Wherefore your petitioner prays that petitioner may be so far made a party defendant in this suit in the matter of said intervening petition and supplemental petition of said Morrison as to prosecute (if it so elect) an appeal from said decree in favor of said Morrison, either in petitioner's own name and on its behalf or in connection with the Union Trust Company of New York, to

101 the Supreme Court of the United States, and as far as otherwise to protect its interests, and petitioner will ever pray, etc.

[Seal of R. R. Co.]

THE ST. LOUIS & CAIRO RAILROAD COMPANY,
By S. CORNING JUDD, *Vice-President.*
WM. RITCHIE, *Secretary.*
S. CORNING JUDD,
Solicitor and of Counsel for Petitioner.

(Endorsed:) Filed May 7, 1884. J. A. Jones, clerk.

And thereupon, to wit, on the day last aforesaid (being Wednesday), at the term court and in the year last aforesaid, the following further proceedings were had in said cause in the matter of said intervening petition and entered of record in said court, to wit:

Decree Admitting St. L. & C. R. R. Co. as Party Def'ts and Allowing Appeal.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY *et al.* } 5187. In Chancery.

In the Matter of the Intervening Petition of WILLIAM R. MORRISON, filed June 30, 1881, and the supplemental petition thereto, filed June 5th, 1882.

102 And now, this day, comes the St. Louis and Cairo Railroad Company, by S. Corning Judd, its counsel, in open court, and by leave of the court files its petition herein to be admitted as a party defendant in this suit in the matter aforesaid so far as to prosecute an appeal (if it so elect), either in its own name and behalf or in connection with The Union Trust Company of New York, complainant in the original cause, from the decree in this cause on the 5th day of May, A. D. 1884, in the matter aforesaid and in favor of the said William R. Morrison, intervening petitioner aforesaid; and the court having considered said petition of said St. Louis and *and* Cairo Railroad Company, and being satisfied that the allegations in said petition are true, on motion of counsel for said petitioner—

It is hereby ordered and decreed that the prayer of said petition be granted and that the said St. Louis and Cairo Railroad Company is hereby permitted to become such party and is hereby made a party defendant herein so far as necessary to protect its interests, and especially so far as to prosecute, either separately or in connection with said Union Trust Company of New York, an appeal to the Supreme Court of the United States from the said order or decree entered herein in the matter of said intervening petition of William R. Morrison and the supplemental petition thereto, rendered on May 5th, A. D. 1884.

And thereupon now comes the said The Union Trust Com-
103 pany of New York, complainant in the above-entitled cause, by Judd & Whitehouse, its solicitors and counsel, and also the said The St. Louis and Cairo Railroad Company, by S. Corning Judd, its counsel (each of said parties appearing by counsel aforesaid in open court), and pray an appeal to the Supreme Court of the United States from the said decree entered herein on the said 5th day of May, A. D. 1884, in the matter of said intervening petition of William R. Morrison aforesaid, and the supplemental petition thereto, each of said parties feeling itself aggrieved by such decree.

And it is, therefore, now ordered that such appeal be allowed, and if said St. Louis and Cairo Railroad Company shall enter into bond for that purpose, within thirty days from this date, in the penal sum of five hundred dollars ($500.00), running to said William R. Morrison as obligee, with S. Corning Judd as surety, said bond to be approved by this court, then said appeal shall operate as a supersedeas.

And thereupon, to wit, on the 9th day of May, in the year last aforesaid, came the Union Trust Company of New York and the St. Louis and Cairo Railroad Company, by their solicitors, and filed
in said clerk's office in said cause their appeal bond in the
104 matter of said intervening petition; which bond was approved by the court and is in the words and figures following, to wit:

Appeal Bond.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

In the Circuit Court of the United States for said District. Equity.

UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD COMPANY *et al.*

In the Matter of the Intervening Petition of WILLIAM R. MORRISON and the petition supplemental thereto.

Know all men by these presents that we, The St. Louis & Cairo Railroad Company, of the State of Illinois, and S. Corning Judd, of Chicago, Cook county, in said State, are held and firmly bound unto the above-named William R. Morrison in the sum of five hundred dollars ($500.00), to be paid to the said William R. Morrison, his heirs, executors, or administrators; to which payment well and truly to be made, we jointly and severally bind ourselves, and the said S. Corning Judd binds also his heirs, administrators, and assigns, firmly by these presents forever.

Sealed with our seals and executed this eighth day of May, A. D. 1884.

105 Whereas the above-named Union Trust Company of New York and St. Louis and Cairo Railroad Company have prayed and been allowed an appeal to the Supreme Court of the United States to reverse the final decree of the circuit court of the United States for

the southern district of Illinois by that court rendered in favor of the said William R. Morrison in the matter of his original and supplemental intervening petitions filed in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Union Trust Company of New York and St. Louis and Cairo Railroad Company shall pro-ecute said appeal with effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal St. Louis and Cairo Railroad Company, 1881.]

THE ST. LOUIS & CAIRO RAILROAD COMPANY,
By S. CORNING JUDD, *Vice-President.*

WM. RITCHIE, *Secretary.*

Attest: S. CORNING JUDD. [SEAL.]

Approved:
S. H. TREAT,
Dist. Judge.

(Endorsed): Filed May 9th, A. D. 1884. J. A. Jones, clerk.

Clerk's Certificate.

106

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In Circuit Court for said District.

I, John A. Jones, clerk of the circuit court of the United States within and for the said southern district of Illinois, do hereby certify that the foregoing is a complete transcript of the record and proceedings in the matter of the intervening petition of William R. Morrison filed in a certain foreclosure cause lately pending in said court, wherein The Union Trust Company of New York is complainant and The Cairo and St. Louis Railroad Company, Willis Cauble, and Henry Holbrook are defendants (being a true and full copy of all the papers filed and the proceedings thereon had in the matter of said intervening petition of William R. Morrison), as fully as the same now appear from the files and records of my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 23d day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

{ The Seal of the Circuit Court of the United States for the South'n Dist. Ill. }

JNO. A. JONES, *Clerk.*

Endorsed on cover: S. Illinois C. C. U. S. No. 341. The Union Trust Company of New York and The St. Louis & Cairo Railroad Company, appellants, *vs.* William R. Morrison. Filed October 6, 1884.

125-591

FILED.
OCT 12 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

THE UNION TRUST COMPANY OF NEW YORK and THE ST. LOUIS AND CAIRO RAILROAD COMPANY, *Appellants,* vs. WILLIAM R. MORRISON, *Appellee.*	No. 64. Appeal from United States Circuit Court, Southern District of Illinois.

APPELLANTS' BRIEF.

I. On the Merits.
II. On the Motion to Dismiss.

JUDD, RITCHIE, ESHER & JUDD,
Counsel for Appellants.

Barnard & Gunthorp, Law Printers, 44 & 46 LaSalle St., Chicago

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

THE UNION TRUST COMPANY OF NEW YORK and THE ST. LOUIS AND CAIRO RAILROAD COMPANY,
Appellants,
vs.
WILLIAM R. MORRISON,
Appellee.

No. 344 64

Appeal from United States Circuit Court, Southern District of Illinois.

STATEMENT.

On October 2, 1871, the Cairo and St. Louis Railroad Company, a corporation of Illinois, executed a deed of trust to the Union Trust Company of New York upon all its railroad, property and assets of every kind, then held and owned or thereafter to be acquired, including all tolls, incomes, rents, issues and profits (Rec., fol. 3, 4), to secure $2,500,000 of negotiable bonds, with interest payable semi-annually on April 1st, and October 1st, and maturing October 2, 1901. In the bonds and the deed of trust it was provided that, in case any installment of interest should remain for six months overdue, the entire principal debt might thereupon be declared due (Rec., fol. 5, 6).

Early in 1872 this trust deed was duly recorded (Rec.,

fol. 3), and during or about the same year all of the said bonds were sold and delivered to *bona fide* holders for value (Rec., fol. 6).

On November 26, 1872, one Henry Holbrook recovered a judgment against the railroad company in the Circuit court of St. Clair county, Illinois, for $9,500.

On January 3, 1873, execution was issued on said judgment, but returned April 3, 1873, by order of Holbrook's own attorneys (Rec., fol. 36, 52).

On October 1, 1873, the railroad company defaulted in the interest then due under the trust deed. Thereafter no part of the mortgage debt, principal or interest, was paid (Rec., fol. 6, 7).

On March 2, 1874, the railroad company, "believing "said judgment to have been fraudulently and wrongfully "obtained by said Holbrook," filed its bill in equity in the Circuit court of St. Clair county, Illinois, to restrain the collection of the same (Rec., fol. 37, 52).

On October 27, 1874, Holbrook caused an *alias* execution to issue upon his judgment (Rec., fol. 36, 37, 52). [Neither this execution nor the first was ever levied.]

To enable the company to obtain the injunction prayed for in its bill, the appellee, Wm. R. Morrison, together with others, became its surety, and on November 24, 1874, executed, as such surety, an injunction bond, obligating the railroad company and said sureties to pay to said Holbrook all moneys and costs due him on said judgment, and all costs and damages that might be awarded against the company in case the injunction should be dissolved (Rec., fol. 37, 38, 42, 43, 53).

On December 30, 1874, upon the filing of said bond,

the injunction was issued restraining the execution of said judgment. (Rec., fol. 37, 38, 52.)

The appellee's petition alleges that appellee's co-sureties on the said bond are insolvent (Rec., fol. 38). But this is denied in the answer of the receiver and the Trust Company (Rec., fol. 53, 54). There is no proof on the subject.

The same is true of appellee's averments as to the railroad company having executed on June 26, 1875, a chattel mortgage upon certain locomotive engines to himself and his co-sureties, in order to indemnify them against possible loss upon said injunction bond (Rec., fol. 39, 40, 41-47). This allegation is not admitted (Rec., fol. 54, 55), and no proof thereof was offered. Indeed, appellee seems to have conceded before the master all the material facts as alleged in the answers of the receiver and the Trust Company. (Rec., fol. 72, 73.)

[In any event, the lien of such a mortgage, under the Statutes of Illinois (Rev. Stat. Ills., 1874, Chap. 95), would have expired in two years from its date, which, in this instance, would have been June 26, 1875, or *several months before the engines could have come into possession of the receiver* appointed as hereinafter set forth.]

At the February term, 1877, of the state court, the injunction suit of the railroad company against Holbrook was dismissed on the hearing, and the company appealed to the Supreme court of Illinois, which appeal was perfected April 10, 1877, and the injunction was thereupon ordered to continue in force till the determination of said appeal (Rec., fol. 38, 39, 54).

On November 8, 1877, the Trust Company, in the exercise of its power as trustee under the mortgage, for-

mally declared the principal of the mortgage debt to be due (Rec., fol. 7).

On December 6, 1877, said trustee, by bill in equity in the court below, to which the said Holbrook was a party defendant, applied for a receiver and for a foreclosure of the mortgage, alleging the insolvency of the railroad company, and that the property and income were respectively insufficient to pay the bonds or the interest thereon, and thereupon, on the same day, a receiver was appointed (Rec., fol. 8, 9).

The order appointing the receiver contained the following clause:

"The said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor or supplies that may have accrued in operation and maintenance of the said railroad property within six months immediately preceding the rendition of this decree." (Rec., fol. 9, 10.)

[It is stipulated that the above is the only provision in said decree for the payment of claims of any kind then due or owing by said railroad company, except claims for taxes. (Rec., fol. 10.)]

On the day of his appointment, the receiver took possession of all the railroad property, income and assets, and continued to hold the same and to operate the road until, by direction of the purchasers at the foreclosure sale, the same were delivered on February 1, 1882, to the appellant, the St. Louis and Cairo Railroad Company. (Rec., fol. 10, 13.)

On February 4, 1878, the receiver petitioned the court below, setting forth that at the time of his appointment there had been and still were pending a number of suits in which the railroad company was a party or was interested, and in which appeals were pending and appeal bonds with sureties had been given; that some of the company's officers had become sureties on said bonds in order to protect the company's rolling stock or personal property from execution pending appeal, levy having been made or threatened in each case at the time the bonds were given. The petition then sets forth that in the case of the railroad company against Holbrook, "an injunction "was awarded upon a bond, with a surety, being given;" that on the hearing of said suit the company's bill had been dismissed and an appeal taken, "the necessary bond "with security being given, and which appeal is still pend-"ing;" that "the sureties on all said appeal bonds claim, "and truly, so far as your petitioner is informed, that they "executed such bonds at the request of the company and "for its benefit solely, having no personal interest what-"ever in the subject-matter of any of the suits, relying on "the assurances of the company, that they should be pro-"tected, and in the belief that all the property of the com-"pany would stand pledged to hold them harmless; that "their action has been to the benefit of all parties inter-"ested in the property of said company, as, in default of "payment (which they were assured the company had "not then the ability to make), property of the company "would have been sacrificed to meet the demands." The receiver, therefore, prayed the court's "special "advice and instruction in respect to said several appeal "cases, and the prosecution thereof, and in regard to said "several bonds, and especially as to whether the petitioner

"shall protect said several sureties in the event of adverse "decisions." (Rec., fol. 16–18, 40.)

Thereupon, on the same day, an order was entered that "the receiver may, and he is hereby "authorized, in his discretion, to prosecute or de- "fend the appeals mentioned, according as the inter- "ests of the receivership shall, in his judgment, be "best promoted; and that he is hereby also authorized, "*in his discretion*, to protect the sureties on the said bonds, "*using his discretion* in each case, saving harmless such "sureties as, *in his judgment*, ought to be so protected in "equity by reason of the protection afforded the property "of the company through the giving of such bonds, or "such of said sureties as ought for other equitable rea- "sons to be so protected. And for the purposes of this "decree the said receiver is authorized to use and pay out "any moneys coming into his hands, as such receiver, "over and above what may be necessary to meet operat- "ing and repairing expenses, &c., it being the intention of "the court to require the expenses for operating, &c., to "be first paid." (Rec., fol. 25–27.)

The receiver never took any action under the authority so conferred (Rec., fol. 24), (except in two cases, Rec., fol. 71, 72).

At the June term, 1879, of the Supreme court of Illinois, the decree dismissing the railroad company's injunction suit was affirmed and the injunction against the collection of the Holbrook judgment finally dissolved. (Rec., fol. 39, 54.)

At the September term, 1880, of the Circuit court of Monroe county, Illinois, where appellee resides, Holbrook recovered judgment upon the injunction bond against the

[redacted] appellee [redacted] for the sum of $13,965 and costs. (Rec., fol. 39, 54.)

On May 16, 1881, the court below entered herein its *final decree* of foreclosure and sale under the mortgage. Said decree found the averments in the bill to be true, and that the sum due under said mortgage on May 16, 1881, was $4,301,157.53.

Said decree also provided that "all persons having "claims or liens against the railroad and property, or "against the proceeds of the sale thereof, and not now "before this court, shall file intervening petitions on or "before the 1st day of July, 1881," and that due notice by publication should be given of said provision. (Rec., fol. 13, 14, 60, 72, 28.)

The prescribed notice having been given (Rec., fol. 13, 14, 28, 61, 72), appellee, on June 30, 1881, filed herein an intervening petition, setting forth the foregoing facts as to the execution of the injunction bond, the final dissolution of the injunction and the petitioner's subsequent liability to Holbrook, and the recovery of the judgment by Holbrook against petitioner in September, 1880, and praying "right and justice, and that (the court) will "order that he shall be fully protected from all the con- "sequences of signing the said bond and from the said "judgment recovered against him," and "such other and "further relief as to equity may seem meet." (Rec., fol. 36–41.)

[It will be observed that this petition does not allege that appellee had then paid the Holbrook judgment, or any part thereof.]

On July 5, 1881, the court below entered an order, "that no claim presented herein after the said 1st day of

"July, A. D. 1881, shall be received or filed in this "cause, and that all persons who have not, on or before "said 1st day of July, A. D. 1881, filed their claims "herein, and all claims not so filed on or before said "date, shall be, and hereby are, forever debarred and "excluded from any and all participation in, or benefit "from or under, the decree in this cause, or from the "property and assets therein mentioned, or from the "proceeds of the sale of such property under said "decree." (Rec., fol. 14–28.)

On July 14, 1881, the foreclosure sale was had, pursuant to the decree of May 16, 1881, the purchasers being C. J. Canda and J. A. Horsey, and the purchase price being $4,000,000. On the same day the sale was ratified by the court. (Rec., fol. 11.)

The said sum of $4,000,000 is all that has ever been realized upon the mortgage debt. (Rec., fol. 11.) The said Cairo and St. Louis Railroad Company then was and still is insolvent. (Rec., fol. 11.)

[As the sum found due on May 16, 1881, was $4,301,-157.53, which, by the day of sale, would have increased to about $4,330,000, it will be seen that there was a final deficiency, and consequent loss to the bondholders, of some $330,000.]

On July 15, 1881, the cause was referred to the master to take proof and report on all intervening claims filed in the cause. (Rec., fol. 66.)

On August 1, 1881, the court below entered an order reciting that it was "important to ascertain what amount "of money ought to be required to be paid into court for "the payment of any claims that may be allowed by the "court," and referring the cause to a master to examine

and report the total amount of all claims for labor and supplies accrued within six months prior to the appointment of the receiver, "as shown by intervening petitions or "claims filed in this cause on or before July 1, 1881," and also "the total amount of other claims or asserted liens "filed in this cause, giving the amount of each claim and "the character thereof, with his conclusions as to whether "or not, on the face of such other intervening petitions or "claims there is a sufficient showing to warrant the court "to require sufficient funds to be paid into court to cover "the same." (Rec., fol. 29-31.)

On December 22, 1881, an order was entered, reciting that said Horsey and Canda had paid the full amount of their bid, that is, $100,000 in cash and the excess thereof in the first mortgage bonds of the said railroad company, and confirming the master's report of the sale, and directing the master to convey said railroad property and assets to said Horsey and Canda, "subject to the lien "of any and all claims against said railroad property and "assets, which are now before this court by intervening "petitions and which shall be, upon final determination "and adjudication, decreed to be paid as liens paramount "to the indebtedness secured by said mortgage." (Rec., fol. 32.) Which conveyance was, on the same day, duly made by the master. (Rec., fol. 11, 12.)

On January 10, 1882, the receiver was, in like manner, ordered to convey to said Horsey and Canda and to deliver possession of the property to them or their grantee. (Rec., fol. 34, 35.)

On January 30, 1882, the receiver conveyed, as directed, to said Horsey and Canda. (Rec., fol. 12.)

On January 31, 1882, said Horsey and Canda conveyed

to the appellant, the St. Louis and Cairo Railroad Company, to which corporation the receiver on February 1, 1882, accordingly delivered possession. (Rec., fol. 12, 13.) The said master's and receiver's conveyances were duly approved by the court immediately upon their execution. (Rec., fol. 13.)

On June 5, 1882, the appellee filed his *supplemental petition* herein, setting forth that, since the filing of his original petition, to wit: on May 29, 1882, he had paid the Holbrook judgment in full, and praying that the receiver be directed to reimburse him therefor. (Rec., fol. 58.) The receiver and the Trust Company making answer to this supplemental petition (Rec., fol. 60–65), the matter came before the master, who, on December 19, 1883, filed his report, wherein he finds, as matter of fact, that appellee did pay the judgment, as alleged, on May 29, 1882, but reporting that appellee's claim must be disallowed as having been filed too late, and consequently as barred by the excludatory order of the court. (Rec., fol. 68–80.) Exceptions to this report being filed by appellee (Rec., fol. 96), the court below sustained the exceptions, allowed appellee's claim and declared the same a lien upon the railroad and property in the hands of the St. Louis and Cairo Railroad Company. (Rec., fol. 97–98.)

And thereupon the said St. Louis and Cairo Railroad Company petitioned for, and obtained, leave to become a party to this cause for the purpose of prosecuting this appeal from said order of allowance. (Rec., fol. 99–104.)

The ground of appellee's exception to the master's report is: "That said master erred in the conclusion that "because the said Morrison, at the time he filed his inter-"vening petition, had not paid the judgment obtained by

" Holbrook, he is not entitled to be protected, while, had " he so paid it, he should be;" " that there is, neither in " law nor in equity, any ground for such distinction as " drawn by the master." (Rec., fol. 96.)

Assignment of Errors.

The court below erred—

In sustaining appellee's exceptions to the master's report;

In finding there was due to appellee the sum of $15,352.19, or any sum;

In decreeing that appellee " has an equitable lien for the " payment" of said sum (or any sum) " against the prop- " erty embraced in the principal cause, and which was " sold under the decree of foreclosure herein, and after- " wards transferred to the St. Louis and Cairo Railroad " Company;"

In decreeing that, in default of the payment aforesaid, with interest, on or before the date mentioned, the appellee might apply for further order respecting said payment;

And, finally, in that appellee's claim was not disallowed and his petition dismissed.

ARGUMENT.

I.

THE EVIDENCE DOES NOT SHOW THAT APPELLEE HAS EVER PAID THE HOLBROOKE CLAIM.

Whatever relief appellee may claim, it is plain that, unless he has actually paid Holbrooke, the court should not have decreed any sum of money to be paid to him, or any lien therefor to be created in his favor. Prior to such payment a surety may, perhaps, compel the creditor to pursue the principal debtor in court, but, until payment in full, Mr. Morrison cannot be subrogated to the rights and remedies of Holbrooke, the judgment creditor.

"The right of subrogation does not arise in favor of a surety until he has actually paid the debt for which he is liable as surety; the right does not accrue to the surety upon his making a partial payment, until the creditor is wholly satisfied. . . . Where the surety is allowed by bill in equity after the debt has become due to compel the creditor to enforce his demand against the principal debtor, yet he cannot be subrogated to the creditor's liens, securities and equities for the debt until he has actually paid it."

Sheldon on Subrogation, Sec. 127.
Conwell v. *McCowan*, 53 Ill., 363.
Darst v. *Bates*, 51 Ill., 439.
1 Ldg. Cas. Eq. (Ed. 1876), 152.

This rule is meant for the protection of the principal debtor, as well as for the benefit of the creditor, and either may insist upon its observance.

Penna. Bk. v. *Potius*, 10 Watts, 152.

"Until the surety pays the debt of his principal, he has no demand upon him; or, to speak with more precision, the relation of debtor and creditor does not (aside from the bankrupt act) subsist between them until such payment."

Kyle v. *Bostick*, 10 Ala., 592.

But this right of the surety's is *solely* for *indemnity*.

"The subrogation of a surety will not be carried farther than is necessary for his indemnity; if he buys up the security at a discount, or makes payment in depreciated currency, he can enforce it only for what it cost him."

Sheldon on Subrogation, Sec. 105.

"The surety is only entitled to recover of his principal to the extent that he is damnified. Reimbursement is all he can ask. If the creditor remits the debt as a gratuity to the surety, the surety can recover nothing, for he has lost nothing."

Snyder v. *Blair*, 33 N. J. Eq., 211.

"He (the surety) is entitled to recover the amount paid, *not the amount extinguished by that payment*."

Bonney v. *Seely*, 2 Wend., 483.
Reed v. *Norris*, 2 M. & Cr., 374-5.

This is because the right of subrogation is purely the creature of equity, and is independent of contract, and "is enforced solely for the purpose of accomplishing the "ends of substantial justice," and, therefore, although the surety's right can never rise higher than that of the cred-

itor for whom he is substituted, yet he may have to be content with a measure of relief inferior to that to which the creditor's contract may have entitled the creditor himself.

Memphis R. R. v. *Dow*, 120 U. S., 301, 302.

The evidence shows that appellee himself was, at the time of the alleged payment, quite seriously embarrassed in money matters, most, if not all of his property being mortgaged; that the surplus, if any, would not have paid the Holbrook claim in full; that he had no money available to pay this judgment; that his attorney, deeming payment of some sort essential to the successful prosecution of this claim, offered to go upon appellee's note for the purpose of borrowing it. This being done, appellee himself has little or no knowledge of what followed, though he "was told that they used that note;" but he "don't know how the money came." (Rec., fol. 90.) When asked "whether that (Holbrook judgment against "himself) has been paid?" he replied that he "made "what was called a payment; did not pay money, but "gave a note on which my attorney said he could get the "money, and gave a check for the money." (Rec., fol. 88.) As to the payment, all he knows is that "the at- "torney for the other party (Holbrook) said he was paid "and entered the judgment, satisfied." (*Ibid.*) He did not make any negotiations or raise the money himself. (*Ibid.*)

Mr. C. W. Thomas, Holbrook's attorney (*and one of the counsel for appellee in this case*), testifies that "that "money was paid to me by Col. Morrison." (Rec., fol. 85.) But that in this Mr. Thomas was mistaken, is clear from appellee's own testimony.

Equity looks through form to substance. Was this, in fact, such a payment as entitles appellee to be subrogated to Holbrook's rights?

Bearing in mind that this question is to be determined by considering not merely whether the Holbrook judgment was extinguished, *but whether appellee was damnified*, the answer seems obvious.

Mr. Morrison has, in fact, simply incurred a fresh *obligation to pay*. He has *relieved himself of a judgment debt* and has *promised to pay* the amount at some future time to some one else, and this, *while the original judgment of Holbrook against the Cairo & St. Louis Railroad Company stands to-day unsatisfied.*

Upon what sort of security, whether negotiable or otherwise, the money was obtained from the bank, nowhere appears.

That this mode of satisfying the creditor by the surety is not sufficient, *even though the debt is thereby extinguished as against the principal debtor*, see

Maxwell v. *Jamison*, 2 B. & Ald., 51.
Taylor v. *Higgins*, 3 East, 169.
Romine v. *Romine*, 59 Ind., 351–2.
Exp. Sergeant, 1 Glyn & J., 183.
S. C. affirmed, 2 *id.*, 23.
Eden on Bkptcy., *158–9.

Non constat that appellee ever will pay or be able to pay. If so, he cannot in contemplation of law, be said to have been damnified.

Taylor v. *Mills*, Cowp., 526–7.

Those who parted with their money to enable this debt

to be paid may suffer, but, until he himself pays, appellee does not.

In effect, appellee asks that the St. Louis & Cairo Railroad Company, an innocent third party, shall be compelled to pay to him some $15,000, because he has *promised* to pay that amount to some one else.

If this proceeding be, in fact, an attempt to enforce, in favor of the Bank of Belleville, the Holbrook judgment against the old Cairo and St. Louis Railroad Company, surely equity will not stretch its arm so far! The bank is a *volunteer*, and not entitled to subrogation. The same is true of Mr. Koerner, upon whose indorsement the appellee's note was negotiated. (Rec., fol. 89, 90.)

Freeman on Judgts., Sec. 468.
Shinn v. *Budd*, 14 N. J. Eq., 236.
Bk. of U. S. v. *Winston*, 2 Brock., 254.
1 Ldg. Cas. Eq. (Ed. 1876), 151.

If hereafter appellee should *compound* this debt with the bank, what then? The bank would have no recourse against the original debtor. Would appellee, if appellant were now compelled to pay him in full, be entitled to retain any surplus?

Cummings v. *Hackley*, 8 Johns. R. 206.

"The surety stands in such a relation to his principal that he cannot be permitted to speculate upon him."

Wynn v. *Brook*, 5 Rawle, 106, 110.

It is the surety's duty "to make the best terms he can" for his principal.

Reed v. *Norris*, 2 M. & Cr., 375.

Suppose Holbrook should at this day attempt to en-

force his original judgment against the Cairo & St. Louis Railroad Company, could that company or this appellant avail itself, in defence, of the fact that Mr. Morrison, to extinguish a judgment against *himself*, had paid Holbrook? Even if such fact were so available, this appellant would be obliged to go into equity to protect itself (supposing said judgment to be a lien upon the latter's property).

II.

Appellee seeks to enforce here not the original Holbrook judgment of November 26, 1872, against the principal debtor, but the judgment of September 30, 1880, against himself!!

The Holbrook judgment of $9,500 would on May 29, 1882 (when appellee is alleged to have paid the judgment against himself), have amounted with interest to $14,962, whereas appellee claims $15,352.19 as of that date. The latter sum is arrived at by calculating interest on the $9,500 from the date of the original judgment against the railroad company up to the rendition of Holbrook's judgment against appellee (September 30, 1880), and then taking the interest on the *aggregate* up to the time of the alleged payment of the latter judgment. Thus *compound interest* is charged, and upon *this* aggregate the decree below *again* allows interest, and makes the whole a charge upon the property in the hands of a purchaser!! The *original* Holbrook judgment with interest to date would amount to some $18,000. If the decree below stands, appellant will be charged with over $20,300.

III.

Aside from all considerations as to the time and mode of its presentation in the court below, *appellee is not, legally or equitably, entitled to a lien upon this property in the hands of the St. Louis and Cairo Railroad Company.*

The purchasers at the foreclosure sale took the property free from all equities which were subordinate to those of the mortgage creditors. The sale cut off all claims subsequent in time to the execution of the mortgage and not superior in equity thereto. The purchasers' title relates back, for this purpose, to the date of the mortgage, and (in the absence of provisions to the contrary in the decree of sale) covers the interests of all persons who are parties to the cause.

2 Jones Mtgs., §§ 1,653, 1,654.

This is as true of railroad as of other mortgages. This appellant, "deriving its title under the sale, took what it "purchased subject to no liens or claims save such, if any, "as were paramount to the deed of trust under which "the sale was made."

Morgan County v. *Thomas*, 76 Ill., 147.
Sullivan v. *R. R. Co.*, 94 U. S., 806.
Menasha v. *R. R.*, 52 Wis., 420.
Wright v. *R. R.*, 25 *id.*, 46.

The purchaser takes free even from taxes accruing against the mortgagor under certain circumstances.

Cooper v. *Corbin*, 105 Ill., 224.

The decree in this cause which ordered conveyances

by the master and receiver to the purchaser, expressly reserved a lien upon the property in favor of claimants having equities paramount to the mortgage. (Rec., fol. 32.) The question here, therefore, is whether appellee's claim is superior in equity to that of the mortgage creditors.

The mere fact that appellee has paid, or agreed to pay money for the common debtor, cannot of itself constitute him anything more than a simple contract creditor, with no peculiar equities over any one else whose money the debtor may have used with benefit to itself. We must, therefore, assume that appellee's claim here really rests upon his right to be substituted in place of the judgment creditor, Holbrook, whom he claims to have satisfied. Having paid, as surety, a debt which the railroad company ought to have paid, he claims to be subrogated to Holbrook's rights. But his rights can never rise superior to Holbrook's.

The party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted; if the latter had not a right of recovery, the former can acquire none.

Sheldon on Subr'n, § 6.

The surety, thus paying, can certainly acquire no greater right than the creditor whose position he is enabled to take by the decree of the court.

Houston v. *Bank*, 25 Ala., 257.

When a surety has paid the debt of his principal, he cannot stand in a better or higher position than the creditor.

Colvin v. *Owens*, 22 *id.*, 794.

The surety paying the debt of his principal is entitled to the benefit of all the security and the lien of the creditor. But it is equally clear that *he cannot extend the lien*

or security beyond their effect and operation in the hands of the creditor.

Dozier v. *Lewis*, 27 Miss., 683.

[We invite the court's attention to the above cited cases not merely as announcing the general doctrine contended for, but as furnishing instances of its application closely parallel to the case at bar.] The surety's remedy cannot be greater than or different from that of the creditor.

Winslow v. *Otis*, 5 Gray, 363.
Tubbs v. *Williams*, 9 Ired. L., 1.
Pierson v. *Catlin*, 18 Vt., 86.
Ins. Co. v. *Winn*, 4 Md. Ch. Dec., 264.

What, then, were Holbrook's rights under his judgment of November, 1872?

Being subsequent, it would ordinarily be subordinate, to the mortgage, which covered all the debtor's property then owned or thereafter acquired.

Pennock v. *Coe*, 23 How., 117.
Dunham v. *Ry. Co.*, 1 Wall., 254.
Scott v. *Clinton R. R.*, 6 Biss., 534.
Cent. Tr. Co. v. *R. R.*, 30 Fed. Rep., 897.
Hammock v. *L. & T. Co.*, 105 U. S., 91.

Prima facie the proceeds of the sale belong to the mortgage creditors.

Fosdick v. *Schall*, 99 U. S., 255.

"Each claim will rest upon its own peculiar merits, "and as the mortgagees have *prima facie* an equitable

"claim to the whole fund, the *onus* will be upon each "general creditor to establish a superior right."

Douglas v. *Cline*, 12 Bush., 631, 632.

To overcome this presumption, there must be some "peculiar equity," some "special circumstances," the existence of which the claimant himself must clearly and affirmatively establish to the court's satisfaction, for the chancellor will always observe great caution in establishing such a preference as appellee here claims.

Miltenberger v. *Ry. Co.*, 106 U. S., 311.
Fosdick v. *Schall*, *supra.*
U. Tr. Co. v. *Ill. Mid. Co.*, 117 U. S., 458, 479.
Meyer v. *Johnston*, 53 Ala., 349.
Blair v. *Ry. Co.*, 22 Fed. Rep., 475.

The appointment of a receiver, presumably holding and conducting the business for the benefit of all the creditors, should have no effect, of itself, to change the relations of the creditors to each other or to the common debtor.

In the case at bar there is no allegation or proof as to the nature of the claim upon which Holbrook's original judgment was rendered.

This, it would seem, ought, of itself, to dispose of appellee's claim.

Even an expenditure by the receiver himself after his appointment and confessedly for the benefit of the trust, will not be allowed priority, if "the purposes for which "that sum was used were not sufficiently shown."

U. Tr. Co. v. *Ill. Mid. Co.*, 117 U. S., 478–9.

But appellee, apparently upon the theory that equities superior to those of Holbrook might be, and ought to be, raised herein in his favor, seems to rely upon certain allegations contained in a petition of the receiver, wherein the receiver asks instructions from the court below as to the prosecution of a number of pending appeal cases. (See *ante*, pages 5 and 6; Rec. fol., 16–18, 40.)

Of these allegations it will be noted that they refer in general terms to a large number of cases, of which the Holbrook case is but one; that, so far as relates to their truth, the receiver merely states that "the sureties claim, "and truly, so far as petitioner is informed," that the matters referred to are true; that even this qualified averment is confined to "the sureties on said *appeal* bonds," whereas appellee is a surety on an injunction bond; and, finally, that the order of court upon said petition left the matter of investigating and prosecuting said appeals and protecting the sureties entirely to the receiver's discretion (*ante*, p. 6), and that, although in a few instances (Rec., fol., 71, 72) the receiver, upon inquiry, felt justified in protecting the sureties, yet in appellee's case he did not do so. These qualified and indirect averments, upon which appellee apparently relies to establish the "special circumstances" and "peculiar equity," entitling his claim to preference, are as follows:

"That they (said sureties) executed such bonds at the "request of the company, and for its benefit solely, hav- "ing no personal interest whatever in the subject-matter "of any of the suits; that they did so relying on the "assurance of the company that they should be pro- "tected, and in the belief that all the property of the "company would stand pledged to hold them harmless; "that their action has been to the benefit of all parties

" interested in the property of said railroad company, as, " in default of payment (which they were assured the " company had not then the ability to make), property " of the company would have been sacrificed to meet the " demands." (Rec., fol. 50.)

If the above are to be deemed allegations of material facts, instead of a mere statement of inferences or conclusions founded upon the conduct of the parties, yet they can avail appellee naught here, because there is no syllable of proof relating thereto or in any way describing the special circumstances which may have induced appellee to become surety upon the injunction bond.

Upon one point in these allegations, however (and that, seemingly, the most pertinent), it would seem that the receiver must have been mistaken, so far, at least, as his averments relate to this appellee. It is apparent that this appellee, at least, did not content himself with merely " relying on the assurances of the company that [he] would " be protected." Nor, apparently, did he indulge " in the " belief that *all* the property of the company would stand " pledged to hold [him] harmless," *since he exacted of the debtor* (if his own averments are sufficient on that head) *collateral security in the shape of a chattel mortgage upon four locomotive engines.* There were three sureties, but this mortgage runs to appellee alone. For his proportion of the then contingent liability, therefore, appellee's indemnifying security would appear to have been ample. The appellee at that time, also, evidently contemplated a continued reliance upon this collateral security, as the mortgage obligates the grantor to renew the same in two years from date, if necessary. (Rec., 46.)

With reference to the subject-matter of the above

allegations in the receiver's petition, the only *facts* that the record discloses are as follows:

The Holbrook judgment was rendered November 26, 1872. On January 3, 1873, execution thereon was issued, but held until April 3, 1873, when it was returned by the sheriff without levy, by order of Holbrook's own attorneys. In the October following the company defaulted in its interest on the mortgage, making it possible *at that time* for the mortgagee to proceed to foreclosure. But Holbrook still withheld execution until October 27, 1874, (at which time the company, of course, had defaulted in several more installments of interest.) At the latter date he took out an *alias* execution, but still delayed to levy, when, on December 30, 1874, the company, by filing its injunction bond, with appellee and others as sureties, prevented any further efforts to collect the judgment, if any were contemplated. The injunction suit was then allowed to drag its slow length along until at the June term, 1879, of the Supreme court, a final decision was had.

Does this statement exhibit such "special circumstances" as would raise any "peculiar equity" in appellee's favor?

Suppose he had declined to become surety for the railroad company, and that, in consequence, Holbrook had levied his execution, wherein would the mortgage creditors have been injured? At that date (December 30, 1874), the mortgagee's right to foreclose had matured. Would not the judgment have remained subject to the mortgage? Would not the claims of the mortgage creditors have remained paramount to Holbrook's? Possibly such a seizure might have precipitated a foreclosure or the appointment of a receiver, but what possible ground is there to infer that thereby the interests of the mortgage

creditors would have suffered? After October, 1873, they received no portion of their principal or interest, anyhow.

Nay, in truth, if we are to indulge in conjecture, it is more than possible that *the mortgagee has actually suffered by the act of the appellee in staying Holbrook's execution*, or will suffer thereby, if appellee's claim herein is to be allowed. Holbrook, instead of levying on the rolling stock, might have made his claim out of the *income* of the road while the mortgagor remained in possession. This he could have done without interference with any of the mortgagee's rights or interests.

Gilman v. *Tel. Co.* 91 U. S., 603.
Miss. Ry. Co. v. *U. S. Exp. Co.* 81 Ill., 537.

Is it possible, then, that appellee can, as against the mortgagee or his grantee, assert any superior equity upon such a showing?

Sheldon on Subr'n, § 132.
Mitchell v. *De Witt*, 25 Tex. (Suppl.), 180.
Burns v. *Huntington*, 1 Penr. & W., 395.
Potter v. *Nathans*, 1 W. & S., 155.
Armstrong's Appeal, 5 *id.*, 352.

"To entitle a party to subrogation his equity must be strong and the case clear. In such applications great care should be taken by the court that the subrogation will work no injustice to the rights of others. And it will never be allowed where the equity of the party seeking it is no stronger than the equity of the party affected by it."

Knouf's Appeal, 91 Penn. St., 82.

"A surety who *was not originally bound* for the debt,

but who *comes in during the prosecution of a remedy for the debt* against the principal, *cannot*, by subrogation, *obtain a preference* over creditors of the principal, whose lien attached before the surety became bound."

Brandt on Suretyship, Sec. 268.

This is true, even though the claim of such creditors accrued subsequent to, and subject to, that of the principal creditor.

Farmers' Bank v. *Sherly*, 12 Bush, 304.
Fishback v. *Bodman*, 14 *id.*, 117.
Johnson v. *Morrison*, 5 B. Mon., 106.
Glass v. *Pullen*, 6 Bush., 350-1.

In fact, appellee is a *volunteer*. He was not a party to the original contract between Holbrook and the Cairo and St. Louis Railroad Company. He became a party without Holbrook's consent, indeed, against the latter's interest, and for the very purpose of delaying or defeating him.

Bank v. *Winston*, 2 Brock., 254.
Ins. Co. v. *Dorsey*, 3 Md. Ch. Dec., 340.
Swan v. *Patterson*, 7 Md., 170.
Gadsden v. *Brown*, 1 Speer Eq., 42.
Shinn v. *Budd*, 14 N. J. Eq., 237.

We have held that where the interposition of the bail is the means of hindering and delaying the payment of the debt, *such bail has less equity* than one who has been a prior surety. *The principle of these cases is that a bail who intervenes to hinder execution,* HAS NO EQUITY *against other persons that may have been injured by the stay of execution*..... The purpose for which the bail was entered was to delay execution. This *may* have prevented a payment by the debtor or out of his funds. Substitution is a matter of benevolence and equity, and is sought

in this case in order to acquire a preference. As between the bail and the principal debtor, there would, perhaps, be no difficulty; *but regard is always had, in these questions, to third persons, whose right may be affected by such substitution.*

Armstrong's Appeal, 5 W. & S., 356.

We *have seen no case* in which it has been decided, either in terms or in effect, that a surety, becoming so by entering into an obligation taken in the prosecution of the ordinary coercive remedies against the person of the debtor, can, by paying the debt, acquire such an interest in the mortgage or other lien of the creditor as will enable him to displace any *pre-existing specific interest* in the mortgaged property derived from the debtor after the date of the mortgage.

Patterson v. *Pope*, 5 Dana, 243.

We are decidedly of the opinion that a surety who first comes in as surety in an obligation incidental to the prosecution of the legal remedy against the person of the debtor, is *prima facie*, to be considered as *trusting to his principal only*, for whom alone he is surety; that, upon his paying the debt, he is entitled to stand in the creditor's place *only as to his remedies against the person and property of the principal*, and that, *as to* any prior surety, or *any prior interest in the property*, which may be under pledge, he *must occupy the place of the* DEBTOR.

Same case, p. 246.

As toward other creditors, Mr. Morrison must be deemed to have trusted to his principal, and not to the property.

Johnson v. *Morrison*, 5 B. Mon., 107.

In *Patterson* v. *Pope*, as here, the claimant was surety upon the debtor's injunction bond, and, as such, had been compelled to pay the debt.

"It is said that it is a general rule in equity that a surety is entitled to the benefit of all the securities which the

creditor has. That is true. But then it is to be understood with all the qualifications belonging to the doctrine. *Against whom* is he entitled to these securities? *Certainly not against persons who have a prior or higher equity*, but *solely against the principal and those who claim those securities by a posterior and dependent equity.*"

Wiggins v. *Dorr*, 3 Sumn., 419, 420.

The surety is, in general, entitled to all the remedies of the creditor against the person and the property of the debtor; but this equitable right of remuneration from the principal debtor is not a sufficient foundation for disregarding or subjecting to its satisfaction the interests of third persons, which, although they may be subordinate to the lien of the creditor, are prior in date and more specific in character than the equity of the surety, which cannot commence until he becomes bound for the debt, if, indeed, it can commence before payment.

Bank v. *Rudy*, 2 Bush, 329.

As against one whose interests accrued prior to the execution of the injunction bond or bail bond, the surety on such bonds "has so identified himself with the principal "as not to be distinguished from him."

Burns v. *Bank*, 1 Pen. & W., 398. (Gibson, C. J.)
Parsons v. *Briddock*, 2 Vern., 608.
Wright v. *Morley*, 11 Ves., 22.
Smith v. *Anderson*, 18 Md., 520.
McCormick v. *Irwin*, 35 Penn. St., 111.

In the cases cited the interest of the successful claimant (against whom the right of subrogation to the principal creditor's securities was sought to be enforced) was confessedly subordinate to that creditor's rights. Here appellant's interests are prior and superior to those of Hol-

brook. There would, therefore, seem to be much stronger grounds for enforcing the rule contended for in this case than in the cases cited.

The practical effect of Mr. Morrison's act in becoming surety was to prevent the Holbrook judgment from being satisfied at all at a time when it may have been satisfied out of property not covered by appellant's mortgage. To this extent appellee's act impaired appellant's security.

Bank v. *Rudy*, 2 Bush, 330, 331.

If there was any property in December, 1874, not covered by the mortgage, Holbrook held a lien upon it. The case, then, becomes one where a creditor having a lien on two funds, releases one fund to the prejudice of another creditor, having a lien only on the latter.

Glass v. *Pullen*, 6 Bush, 346.
1 Story Eq. Jur., Secs. 633-4.

It may be objected that the income may have been insufficient to pay Holbrook. Nevertheless, perhaps he could have made his claim out of other property belonging to the debtor and not covered by the mortgage. In any event THE ONUS IS UPON THE APPELLEE *to show affirmatively that there was no other property but that covered by the mortgage upon which Holbrook could have levied.* The allowance of his claim to precedence over a prior mortgagee, if allowed at all, can only be justified as a rare *exception.* The equity must be "peculiar"; the circumstances must be "special." *He* is bound to establish to the court's satisfaction *all* the conditions necessary to bring his case within the exception. He cannot rely upon inferences or presumption, if any there be, that Holbrook would or could have enforced his judgment

only in some mode that would have resulted to the mortgagee's disadvantage, and then base upon such a presumption an equity superior to the mortgagee's, as having, in some sort, rendered to the latter the services of a salvor. Even a salvor can claim no special merit in court from the fact that his conduct *probably* saved the vessel from what were then *future possible* perils.

In most of the cases cited above upon this point, it was not held necessary for the successful contestant to show affirmatively that the interposition of the bail bond or injunction bond *did*, in fact, result to his injury; but the court inferred that it *might* have so resulted, and left to the opposing claimant the duty of establishing that such injury did *not* accrue.

"It is sufficient ..... that, if the interposition of the second surety *may* have been the means of involving the first in ultimate liability to pay, the equity of the first decidedly preponderates."

Pott v. *Nathan*, 1 W. & S., 157.
Mitchell v. *De Witt*, 25 Tex. (Suppl.), 187.

Appellee became surety on the injunction bond in November, 1874. Foreclosure proceedings in this cause were not begun until December, 1877. To suppose that during all the intervening period the debtor would have had no property or funds available for the payment of this judgment is to carry presumption very far in favor of one against whom every presumption should be made.

There either was or there was not property upon which Holbrook could have seized without being subject to the mortgage. If there was such property, then appellee has prevented him from realizing upon it and is, nevertheless, now asking that the debt be charged entirely upon the mortgaged property.

(Insert at p. 31, line 7, Appellants' Brief)

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1887.

No. 64.

THE UNION TRUST CO. ET AL.
vs.
WILLIAM R. MORRISON.
} Appeal from U. S. Circuit Court, S. Dist. of Illinois.

ERRATA IN APPELLANTS' BRIEF.

By executing the injunction bond Mr. Morrison destroyed the effect of the Holbrook judgment as a lien on the personalty, and released the latter.

Launtz v. *Gross*, 16 Bradw. (Ill. App.), 331.

Consequently, even if subrogated to Holbrook's rights, Morrison could claim no lien on the personalty. There never was a levy under the judgment, and as a lien the execution had become *functus officio* before the receiver took possession.

Carroll v. *The S. S. Leathers*, Newb. Adm. Rep., 432.
Roberts v. *Huntsville*, 2 Woods, 387.
The Madgis, 31 Fed. Rep., 926.

Even without such bond Holbrook could not have seized the company's realty under his judgment (such of it, at least, as was covered by the mortgage. Jones on R. R. Securities, Secs. 104–106).

Gue v. *Canal Co.*, 24 How., 257.
Hammock v. *L. & Tr. Co.*, 105 U. S., 91.
Jones on R. R. Securities, §§ 157, 158.

Appellee can, therefore, claim no "peculiar equity" against the mortgagee as having saved the realty from seizure.

If there was no such property, it was because all the debtor's property was subject to the mortgage, in which case Holbrook's judgment would also have been subject to that mortgage. If this be so, then it cannot be that appellee has rendered the mortgagee any peculiar service in delaying execution or has any peculiar equity over the latter.

In the case of railroad foreclosures, certain classes of claims accruing subsequently to the mortgage, have been awarded priority over the mortgage debt by the courts.

Let us, therefore, see if appellee's claim comes within this favored class.

Debts incurred by the receiver after his appointment under order of court and for the benefit of the property are, of course, preferred, being expenses of the trust. In the case of a railroad, a *quasi* public institution, enjoying franchises from the public and owing duties to the public, and public interests requiring that it be kept in continued operation and repair, the courts have felt authorized in empowering receivers to make many expenditures for such purposes, even without the expressed or formal consent of the mortgagees or other creditors, and in making such debts a prior lien. Every railroad mortgage is presumed to be made upon such implied conditions. The nature of the property and business distinguishes it from the case of ordinary business enterprises, wherein the public interests are not so intimately concerned. But such considerations look to the future, not the past. They do not have in view the redress of past wrongs, but are rather founded on the necessity of maintaining a public concern as a "going concern" and of preserving and, perhaps, enhancing the mortgage security for the benefit of all. Money must be had for such purposes, and can

only be had upon condition of making the lender a preferred creditor.

Meyer v. *Johnson*, 53 Ala., 348.
Union Tr. Co. v. *Ills. Midland Co.*, 117 U. S., 463.

As to claims accruing prior to the receiver's appointment, certain other considerations prevail.

When, instead of relying upon his strict rights, a mortgagee prays for a mode of relief, the granting of which is not a matter of strict right, but in great measure discretionary with the chancellor, the latter has the power, within certain reasonable limits, of imposing conditions upon the applicant. A frequent condition in railroad foreclosures is that all claims for labor and supplies accrued within a specified period before the appointment of the receiver shall be accorded priority of lien upon the *income* of the road accruing during the receivership. As to this particular class of claim, such a condition was probably suggested by the legislative provision so common, whereby laborers and materialmen are awarded priority upon condition of pressing their claims within a fixed period.

The strong natural equity of such claims and the legislative policy thus evinced doubtless first recommended such claimants to the courts as peculiar objects of protection. (*Scott* v. *Clinton R. R.*, 6 Biss., 535.) There is also a class of debts (perhaps including the last mentioned) which can be best described as "current debts," which have been favored in like manner. These are such debts as, in the usual course of business of a running concern like a railroad, are paid from day to day, or at short intervals, out of the income of the road and for purposes necessary to the proper maintenance and operation

thereof. Such allowances are made for sound equitable reasons. The income upon which the mortgage, prior to foreclosure, is a lien is the *net* income, derived after payment from the gross earnings of just such "current debts." But railroad companies not infrequently pay bonded interest and allow such claims to accumulate unpaid. When, therefore, in such cases the court, in a foreclosure suit, awards priority to such creditors, it simply *restores* to them that which the common debtor had inequitably *diverted* from them to the mortgagee's benefit, the mortgagor retaining control of the income so long as it is allowed to remain in possession. Or, perhaps, this diversion may have occurred subsequent to the receiver's appointment, by order of court and presumably upon the request or with the consent of the mortgagee, and in the shape of expenditures for permanent improvement of the property, or by additional rolling stock or extensions of track, etc. Such expenditures necessarily result in enhancing the mortgagee's security, and yet they come from the income which ought first to have gone to pay the "current debts." They, in like manner and degree constitute a *diversion* of funds in favor of the mortgage creditor and adversely to the "current debt" claimant. Equity, therefore, not infrequently requires a *restoration* to the latter class on account of such expenditures even by the receiver.

Fosdick v. *Schall*, 99 U. S., 252–3.
U. Tr. Co. v. *Souther*, 107 U. S., 591.
Burnham v. *Bowen*, 111 U. S., 776.

But as to these ante-receivership debts, it must be remembered that "the payment of such debts stands, *prima* "*facie*, on a different basis from the payment of claims "arising under the receivership"; that the chancellor's

discretion to award to such claimants a priority of lien "should be exercised with very great care," and that they can only be "brought within the principle" on which receivership debts are preferred "by special circum- "stances."

Miltenberger v. *Ry. Co.*, 106 U. S., 311.

"This court has *never* held that the income of a rail- "road in the hands of a receiver, for the benefit of mort- "gage creditors who have a lien upon it under their "mortgage, can be taken away from them and used to "pay the general creditors of the road." All that it has decided is "that, if current earnings are used for *the ben-* "*efit* of *mortgage creditors* before *current* expenses are "paid, the mortgage security is chargeable in equity with "the restoration of the fund which has been thus im- "properly applied to *their* use."

Burnham v. *Bowen*, 111 U. S., 783.

The limitations are thus stated in *Fosdick* v. *Schall*, 99 U. S., 254:

"The power [of the chancellor to award priority to such debts], rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. IT FOLLOWS THAT, IF THERE HAS BEEN, IN REALITY, NO DIVERSION, THERE CAN BE NO RESTORATION; AND THAT THE AMOUNT OF RESTORATION MUST DEPEND UPON THE AMOUNT OF DIVERSION."

In no subsequent case has this court ever intimated the slightest purpose to depart from the limitations there laid down.

There is not in this record one syllable of evidence tending to show in any way that there has been any such "diversion" of funds as is contemplated in the above decisions.

This being so, it would hardly seem pertinent to inquire whether, even if such diversion had been shown here, appellee's claim belongs to the class entitled to the benefits of the rule, because, as in *Fosdick* v. *Schall*, 99, U. S., 255, "there is nothing to show" that such an inequitable diversion has here occurred.

Assuming the contrary, however, we submit that *no instance can be found in which this court has applied the rule of preference to a claim of the nature of this.*

On the contrary, in many instances, claimants having far stronger equities than this appellee have been denied preference as not coming within the conditions of the rule.

In *Fosdick* v. *Schall*, 99 U. S., the mortgagor had used cars belonging to Schall under a contract to purchase, the title to remain in Schall until fully paid for. Before full payment was made the mortgagee began suit and a receiver was appointed, who, by agreement with Schall, paid rent for the cars so long as used by the receiver. Upon Schall's petition the court ordered the cars to be returned to him, but refused him any compensation out of the income of the receivership for the use of the cars during any time prior to the receivership, because "for "the balance, his due, ... Schall occupies the position of "a general creditor only," and because "*there is nothing* "*to show* that the current income of the receivership or of "the company has been employed so as to deprive this "creditor of any of his equitable rights." (Page 255.)

In *Galveston R. R.* v. *Cowdrey*, 11 Wall., 459, the first

mortgage covered all the road and property then owned or thereafter to be acquired. A subsequent mortgage was given to one Pulsford, whose money, loaned thereunder, constructed a branch road, and who, in consequence, claimed a superior equity as to such branch road, upon the ground, common in maritime law, that his capital had conserved the property and rendered it capable of operation, which it would not otherwise have been. But this claim was rejected, even though the branch so constructed had not, of course, been in existence when the first mortgage was made.

In *Dunham* v. *R. R. Co.*, 1 Wall., 254, the company, having executed a similar mortgage, proceeded to build its road, but failed to complete it for want of funds. A contractor then took up the work to complete it, upon an agreement with the company that he was to retain possession of the road and apply its earnings to his claim. The mortgagee was, nevertheless, awarded priority over a judgment obtained by said contractor, for his said services, though the latter had never surrendered possession of the road up to the time of foreclosure proceedings.

So in *Porter* v. *Bessemer Steel Co.*, 120 U. S., 671, where the court says:

The claims of the appellees are for the original construction of the railroad. This is not the case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel, are to be applied to restore earnings which, instead of having been applied to pay *operating expenses* and *necessary repairs*, have been *diverted to pay interest on mortgage bonds and the improvement of the mortgage property*, the debts due for operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale, of *such* debts for *operat-*

ing expenses and *necessary repairs*, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a mortgage on it. These appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went toward keeping a completed road in operation, either in the way of *labor* or *material*. .... We are not aware of any well considered adjudged case which .... holds that unsecured floating debts for construction are a lien on a railroad, superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way.

One of the claims so rejected in the case last cited was for bridges built as a part of the road, and under express contract that they should remain the property of the appellee until paid for. Yet the court held that such bridges, becoming a part of the permanent structure and attached to the freehold, immediately became subject to the mortgage, freed of prior conditions, and that, in this respect, the rule applicable to "loose property, susceptible of sep- "arate ownership and of separate liens," like locomotives and cars, did not apply.

Porter v. *Pittsburg Steel Co.*, 122 U. S., 283.

In *Huidekoper* v. *Locomotive Works*, 99 U. S., 258, appellee contracted to sell cars to the mortgagor company, the title to remain in vendor until payment. A receiver was appointed and took and used the cars before they were paid for. Upon appellee's petition, the court ordered the cars restored to appellee. Appellee also claimed damages for wear and tear of the cars while in the company's use, but this claim was rejected as exhibiting "no equitable claim upon any fund in court," it being considered that

"the Locomotive Company occupies the position of a "general creditor, with no special equities in its favor."

In *Union Trust Co.* v. *Ills. Midland Co.*, 117 U. S., 434, claims for sums borrowed by the receiver after his appointment without previous authority from the court, were disallowed, though confessedly applied to the purposes of the trust. In the same case the receiver, without consulting the court, borrowed other sums and gave his own notes therefor (practically *becoming a surety* for the benefit of the mortgagee and other creditors), and applied the same to what were conceded to be proper expenses of the receivership. Yet even the receiver's own claim to priority in such case was denied by the court.

In the same case the court disallowed claims to preference for rent, right of way and extraordinary depreciation in rolling stock.

In *Penn* v. *Calhoun*, 121 U. S., 251, the Belleville Bank, shortly before the appointment of the receiver, had loaned the mortgagor company $40,000, secured by the company's note and certain of its mortgage bonds as collateral. At that time the company was already heavily in debt, and this money went into its general fund and was used to pay pressing claims. The current earnings were used to make permanent improvements, to buy rolling stock and meet bonded interest. This court held, however, that the bank should be considered *as relying upon the collateral security it had exacted*, and not specifically upon the road's earnings, and that it was entitled to no preference out of the proceeds of the foreclosure sale. "It occupies the position of a general creditor only."

Appellee in the case at bar took collateral security in like manner.

The courts have never attempted any very precise definition of what is to be deemed a "current debt," such as would come within the rule of preference.

In *Burnham* v. *Bowen*, 111 U. S., 780, 781, such claims are spoken of as "debts which in equity and good "conscience, considering the character of the business, are "chargeable upon the earnings, . . . what may properly "be termed debts of the income." In that case the debt was for fuel for the engines, "incurred to keep the road running." The next sentence of the opinion (p. 781) suggests an excellent test: "If the [mortgage] trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation [having been allowed to remain in possession after default], was doing for them." Whether mortgagor or mortgagee be in possession, money must be expended for labor, for coal, for machinery, for repairs; but surely a mortgagee in possession is not obliged to pay subsequent judgment creditors whose claims are founded upon no one knows what; nor would he find it necessary to obtain sureties for the purpose of enjoining judgments subsequent to his own lien!!

What possible grounds can be invented for holding this appellee's claim to be a "debt of the income," which would not equally include all claimants whose money, property or labor had contributed in any way to the advantage or relief of the common debtor!!

The lower courts have uniformly held that a judgment against the mortgagor subsequent to the mortgage, but

prior to the receivership, must be held subject to the mortgage.

Cent. Tr. Co. v. *R. R.*, 30 Fed. R., 897.
Hiler v. *Rec'r*, 9 Biss., 549.
Hammock v. *L. & Tr. Co.*, 105 U. S., 91.

In *Duncan* v. *R. R. Co.*, 2 Woods, 542, the court refused to allow priority to persons who had *indorsed the company's paper* to enable it to obtain supplies.

In *Newport Bridge Co.* v. *Douglas*, 12 Bush, 675 (714), the Supreme court of Kentucky (which recognizes the right of preference of certain classes of claims, as announced in *Fosdick* v. *Schall*. See *Douglas* v. *Kline*, 12 Bush, 608) held that even *for money loaned to the company to pay bonded interest* the lender was not entitled to share equally with, or to be preferred to, the mortgage creditors.

In *Kelly* v. *R. R. Co.*, 10 Biss., 151, the claimant had paid an indebtedness of the mortgagor, incurred on account of construction, and claimed priority on the ground that the original debt had been incurred by the company at the mortgagee's own request, and that the latter's security had been greatly benefited thereby. *Held*, that this did not suffice to give claimant priority over the mortgage creditors.

Not only is this claim not of the nature of a "current "debt," but *it comes within no reasonable limit as to time.*

The Holbrook judgment was rendered in 1872, and the receiver was not appointed until *five years* thereafter. While the courts have never undertaken to designate any fixed, certain period of limitation for all cases, it is submitted that such a period as *five years* is without

precedent! The usual period fixed by order of court is commonly six months, seldom over that.

Scott v. *Clinton R. R.*, 6 Biss., 535.
Turner v. *R. R.*, 8 Biss., 318.
Blair v. *R. R. Co.*, 22 Fed. R., 474.

Such was the period so fixed in this case (*ante*, p. 4).

It cannot be replied that this delay was compulsory on Holbrook's part, since it was *appellee himself* who *compelled the delay*.

Furthermore, from November, 1872, until December 30, 1874, there was no obstacle in Holbrook's way.

That there should be some period of limitation, and that such period should be reasonably short, is obvious. Otherwise, no bondholder could safely accept interest on his bonds, for fear that during some indefinite period in the past, there may have been a "diversion" of the earnings from "current debts," for which he might be called on to make a restitution; there would, then, be an enforced accumulation of arrears of interest, against which the bondholders could not protect themselves.

We submit that *five years* exceeds all reasonable limits, and that, therefore, this claim is stale.

IV.

APPELLEE'S CLAIM WAS BARRED BY THE EXCLUDATORY ORDERS ENTERED PREVIOUS TO THE FORECLOSURE SALE.

The St. Louis and Cairo Railroad Company, the principal appellant here, was not a party, save by fiction of law, to the principal cause below; it had no day in court and no opportunity to favor or oppose any of the steps in the cause. It would, therefore, seem no more than just that, in determining its rights herein, as liberal a construction of the orders of the court should be made in its favor as is consistent with the language in which such orders are expressed.

Koontz v. *Bank*, 16 Wall., 196.
2 Jones Mtgs., § 1,647.
Miller v. *Sherry*, 2 Wall., 250.
Hamlin v. *McCahill*, Clarke Chy., 249.

The doctrine of notice by *lis pendens* being one *strictissimi juris*.

Cockrill v. *Manny*, 2 Coop. Ch., 59.

In taking the conveyances from the master and the receiver, the purchasers had notice of the order of December 6, 1877 (when the receiver was appointed). This order (so far as affects this case) allows priority to claims "for *labor* or *supplies* that may have accrued in "*operation* and *maintenance* of the said railroad property "*within six months* immediately preceding the rendition

" of this decree." (*Ante*, page 4.) This is the *only* class of ante-receivership claims provided for in said decree, except taxes.

Next comes the order of February 8, 1878, authorizing the receiver, *in his discretion*, to protect the sureties on appeal and injunction bonds in a number of cases, whereof Holbrook's was one. (*Ante*, page 6.)

As this order left the matter entirely to the receiver's " discretion," no possible right ought to be predicated upon it, since the receiver, in exercising that discretion, failed to recognize appellee's claim.

It must be remembered that *appellee was not induced by the receiver*, or by any one representing the mortgagee, to become surety for the mortgagor. Whatever contingent liability appellee incurred had been incurred before the receiver was appointed. This petition of the receiver (*ante*, page 5) and order of the court (*ante*, page 6) cannot be construed into a *promise*, and, if so, it was a promise unsupported by any consideration.

It nowhere appears that the receiver ever became a party to the appeal in the Holbrook suit. The record recites that he took no action under the order. (*Ante*, page 6.) Nor was such a step necessary at all to the protection of the property in the receiver's hands; certainly, it was not necessary to the interest of the *mortgagee*, since the latter's claim was superior to Holbrook's, anyhow, and it could be of no consequence to the mortgagee whether the Holbrook judgment should stand or not.

Moreover, the promise, if any, implied in this order of court, was merely to " protect " the sureties. Was such protection to be afforded *only* by declaring their claim a

lien upon the property? Do this petition and this order convey to a subsequent purchaser notice of any such lien?

Brightman v. *Brightman*, 1 R. I., 112.
Sapp v. *Wightman*, 103 Ill., 158.
Cockrill v. *Manny*, 2 Coop. Ch., 59, 60.
Miller v. *Sherry*, 2 Wall., 237.

Could any *such* measure for protection at that time have been contemplated by the receiver or the court or indicated by the order, since it was, at that time, not known even that appellee would be finally liable to pay Holbrook? Or, if so, that he would, in fact, pay him? And certainly no *lien* could possibly be declared in appellee's favor for any sum of money until he had actually paid out such sum.

The next order of which the purchasers would have had notice is that contained in the final decree of foreclosure of May 16, 1881. This order required "all per-"sons having claims or liens against the *railroad and* "*property*, or against the *proceeds of the sale* thereof," to "file intervening petitions on or before the 1st day of "July, 1881."

This order clearly relates not to claims which were merely good against the mortgagor, the railroad company, but only to such as constituted a *lien* against the *property*. A "claim" against a *person* may or may not also constitute a lien, but a claim against *property* must also be a lien, legal or equitable.

Next comes the appellee's original petition, filed June 30, 1881, setting forth the facts as to the execution of the injunction bond with appellee as surety, the final dis-

solution of the injunction in June, 1879, and the recovery by Holbrook, in 1880, of a judgment against appellee upon the said bond. Said petition, *not alleging that appellee had at that time paid said judgment or any part thereof*, prayed "right and justice," and that the court would "order that he shall be *fully protected* from all "the consequences of signing the said bond and from the "said judgment recovered against him," and for "such "other and further relief as to equity may seem meet." (Rec., fol. 36–41.)

Next comes the order of July 5, 1881, formally declaring that "no claim presented herein after said 1st "day of July, 1881, shall be received or filed in this "cause," and that all persons who had not by that date so filed their claims, should be forever excluded (*ante*, pp. 7, 8).

Next comes the sale on July 14, 1881, and the decree of same date ratifying the same. This decree, taken in connection with that of May 16, 1881, finding the amount due under the mortgage, showed that the purchase price fell below that amount by more than $300,000, and that, therefore, the proceeds of the sale did not even suffice to pay the mortgage debt (*ante*, p. 8).

Next comes the order of August 1, 1881, reciting that it was "important to ascertain what amount of money "ought to be required to be paid into court for the pay-"ment of receiver's certificates of indebtedness author-"ized by this court, and for the payment of any claims "that may be allowed by the court, and all fees, costs and "expenses to be deducted from the proceeds of sale in "this proceeding," and directing the master to examine and report the amount of such receiver's certificates out-

standing, and "also the total amount of all claims against "the receivership or railroad assets in the receiver's pos- "session, as shown by intervening petition, filed on or be- "fore July 1, 1881 (the court having by decree debarred "claims filed herein after said July 1, 1881), that is, the "total amount of all such claims 'for labor or supplies that "may have accrued in the operation and maintenance of' "the Cairo and St. Louis railroad, 'within six months "immediately preceding the rendition' of the decree ap- "pointing the receiver in this cause (December 6, A. D. "1877); that character of claims having been specified "in such decree, and the receiver required to pay the "same 'after paying and discharging the expenses of "operating, maintaining and repairing said railroad and "property, and after making such other payments' au- "thorized by said decree as might 'be necessary for the "conduct of the receivership.'" And said order further directed the master to report "the total amount of other "claims or asserted liens filed in this cause, giving the "amount of each and *the character thereof*, with his con- "clusions as to whether or not, *on the face of such other "intervening petition* (not covered by the foregoing terms "of this order), *there is a sufficient showing to warrant the "court to require sufficient funds to be paid into court* to "cover the same; that said master also report what fur- "ther sum will probably be sufficient to cover the costs, "fees and expenses to be paid out of the proceeds of "sale." (Rec., fol. 29–31.)

The purpose of this order is apparent. The purchasers were prepared to pay the whole purchase price with the bonds of the company at their face value, as they clearly had a right to do, in the absence of any exceptional circumstance. The exceptional circumstance in this case

was the existence of a number of claims superior to that of the mortgagee, and requiring to be paid in preference and in cash. As the difference between cash and bonds, between the nominal and the real value of the obligation of an insolvent concern, was very considerable, it was, of course, a very material thing for all concerned, especially the purchasers, to know exactly the *maximum limit* of their obligation to pay in *cash*. For this reason it was necessary that the intervening claims should be presented to the court in such shape as to show "on their face" at least a *prima facie* right in the claimant to the advancement *at that time* of the *cash* to meet the same. The fact that a petition disclosed *some* elements of such a right would clearly not justify the court in requiring the purchaser to advance cash instead of paying in bonds. The fact that a claimant exhibited an imperfect right, *to the consummation of which some future act on his own part was absolutely essential*, a right, which might, therefore, *never* be perfected, would not suffice for the purpose mentioned. A petition which showed that the petitioner himself was not entitled to be paid any money, and which only prayed in general terms for "protection," could not be considered as showing "on its face" good cause to compel a cash deposit from the vendee.

Henry Holbrook was himself a party to this cause. (See title of cause, Rec., fol. 1, and title of appellee's intervening petition, Rec., fol. 35, 36.) With the judgment creditor, the judgment debtor and the appellee himself in court, is it possible that no mode of "protecting" the latter could then have been conceived except by declaring him entitled to a lien on the proceeds of the sale!

The statutes provides as follows:

When any person bound as surety for another..... apprehends that his principal is likely to become insolvent without discharging the contract, if a right of action has accrued on the contract, he may require the creditor forthwith to sue upon the same; and unless such creditor shall, within a reasonable time and with due diligence, commence suit thereon and prosecute the same to final judgment and execution, the surety shall be discharged.

Rev. Stat. Ills., Chap. 132, "Sureties," Sec. 1.

Bearing in mind that this question is here raised on behalf of a *purchaser* for value (the St. Louis and Cairo Railroad Company), we revert to the rule hereinbefore touched upon, viz: that to fix a purchaser, pending suit, with notice of equities arising out of the suit, the pleadings, etc., must be clear, explicit and direct as to the nature of the claim. The fact that, by possibility, the claim may, upon a contingency not yet accrued, acquire an interest in the *res*, or a lien upon the property in suit, is not enough to charge the property with such a lien in the hands of such purchaser.

Brightman v. *Brightman*, 1 R. I., 112.
Sapp v. *Wightman*, 103 Ill., 158.
Cockrill v. *Manny*, 2 Coop. Ch. (Tenn.), 59.

"I never heard the doctrine carried to the extent that it is to be notice, not only of what is charged in the bill, but is to be considered notice of any equity which by possibility can arise out of the matters in question in the suit."

Shallcross v. *Dixon*, 7 L. J. (N. S.) Chy., 183.

The right of a surety (before he has himself paid the debt) is so uncertain and contingent that, prior to the

express provisions of the bankrupt act naming such cases as within its terms, a surety before such payment could not prove his claim against a bankrupt, and the latter's certificate would not afford him protection against a surety thereafter paying on his account.

"Before the English enactment, a long train of decisions had settled the rule, that when a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt provable under a commission; and *if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally.*"

Cake v. *Lewis*, 8 Barr (Pa.), 494.

[So far as concerns the United States bankrupt act, the above case is not now the law. But that fact does not concern us here.]

1 Cook on Bankruptcy, 245.

Ex parte Barwis, 6 DeG., McN. & G., 769.

As a general rule, until the surety pays the debt of his principal, he has no demand upon him; or, to speak with more precision, the relation of debtor and creditor does not exist between them until such payment. But, by the express terms of this [United States bankrupt] act, the surety is permitted to come in and prove his liability to pay, as a debt.

Kyle v. *Bostick*, 10 Ala., 592.

A surety does not become a creditor of the principal debtor merely by force of the relation existing between them, although the surety may have made himself liable absolutely to the creditor, and the debtor may have undertaken to indemnify him. *Until the surety has actually paid the money*, his liability is wholly *contingent* and *uncertain*. And hence under the earlier bankrupt laws, unless the

surety had actually paid the debt *before* the bankruptcy of the principal, he could not prove under such bankruptcy.

Robson on Bkptcy. (1876), 264.

Independently of statute, therefore, appellee, prior to May 29, 1882 (when he paid Holbrook), had no claim against his insolvent debtor's *estate*, and when the St. Louis and Cairo Railroad Company, in February, 1882, took title and possession, they took with notice of no then existing claim on appellee's part against the property.

The next fact appearing in this cause on this head is, that, in the order of December 22, 1881, ratifying the commissioner's report of sale, the commissioner is directed to convey to the purchasers "the said railroad property "and assets, subject to the *lien* of any and all claims "against the said *railroad property* and *assets*, which are "*now* before this court by intervening petitions, and "which shall be, upon final determination and adjudica-"tion, decreed to be paid as *liens paramount* to the in-"debtedness secured by said mortgage." (Rec., fol. 32.)

This, of course, must mean that the property is to be subject not to any and all claims which the court below might deem proper to allow, but such only as the *law* pronounced entitled to such preference, since no purchaser can be presumed to know or conjecture that the court would allow any others.

The question, then, would seem to turn upon this: When the St. Louis and Cairo Railroad Company bought this property, it bought with notice that appellee was so situated that he was *liable* to pay a debt for which the common debtor was primarily responsible; that at the time of such purchase appellee, in fact, had *not* paid such

debt; but that, in case appellee ever should *thereafter* pay, immediately he would be entitled to recover the amount so paid from the common debtor. *Did all this amount to a notice that appellee ever* WOULD *pay?* Under the facts as disclosed in the evidence, could appellant even have felt any certainty (in case it had inquired the facts) that appellee ever *could* pay?

Suppose appellee had become insolvent, he then could not have paid this sum, and, in that event, could certainly have had no claim against anybody or anything on account of this matter. Was appellant bound to take notice that such a state of affairs did not or would not exist?

The appellant knew that, when it took the property, appellee had no lien thereon for any sum. Was appellant, before buying, bound to wait for some then unknown period until it could learn whether or not appellee could and would pay this debt? If so, for how long could appellant thus delay before purchasing with safety?

Does not the action of the court below, in allowing this claim because of matter occurring after the sale and resale of the property in suit, involve the absurdity and injustice of keeping open and unsettled a matter of right which the interests of all parties require should be known and settled or capable of being known and settled before the sale?

If the principle of this decree is sound, it will hereafter be unsafe ever to buy an estate against which any one sets up a claim which, though confessedly not good at the time of sale, it is yet possible, by some act of the claimant himself in the future, *may* become good against the vendor. As was said in the analagous case of a bankrupt, against whom a surety offered to make proof before ac-

tual payment of the debt: "It was not the intention of "the act to lock up the property of a bankrupt upon a "possibility that at some period or other some person may "have a claim upon it."

Hoffman v. *Fondrinier*, 5 M. & S., 24.

V.

APPELLEE SHOULD NOT HAVE BEEN PERMITTED TO FILE HIS "SUPPLEMENTAL" PETITION OF JUNE 5, 1882.

Affecting materially, as this question does, the substantial rights and interests of the parties, there is no reason why the ordinary rules of pleading, devised for the better enforcement or protection of the rights of suitors, should not be applied here to appellee, though his claim is presented by intervening petition merely.

U. S. Equity Rule 57 makes leave of court necessary to the filing of a supplemental bill. No leave was had in this case.

This supplemental petition sets forth a fact which, though essential to appellee's recovery, did not exist at the time of his original petition. The supplemental petition prays that the receiver be compelled to pay petitioner a certain sum of money—a measure of relief not possible under the original petition.

"We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out

of the same transaction that was the subject of the original bill."

Pinch v. *Anthony*, 10 Allen, 477.
Vaughan v. *Vaughan*, 30 Ala., 330.
Hill v. *Hill*, 10 Ala., 527.

The statute (1 & 2 Vict., Chap. 110, Sec. 13), making judgments a charge upon the real estate of defendants, provided that the judgment creditor should "have the "same remedies in a court of equity against the hereditaments so charged," as if the defendant had, in writing, agreed to charge such realty with the amount of said judgment, "*provided*, that no judgment creditor shall be "entitled to proceed in equity to obtain the benefit of "such charge, until after the expiration of one year after "the entering up of such judgment." In December, 1861, the plaintiff recovered a judgment against defendant, who at that time owned certain realty, subject to a prior mortgage. In August, 1862 (being but eight months after judgment rendered), plaintiff filed his bill, as judgment creditor only, to redeem from the mortgage and to enforce his own lien against defendant. Not having sued out an *elegit*, however, plaintiff could not, independently of above statute, come into equity, and, the time prescribed by the statute not having elapsed, he could not avail himself of its provisions for that purpose. Accordingly, in 1863, he bought up the mortgage, and thereupon amended his bill, praying for payment out of the land, both on the judgment and the mortgage. For plaintiff it was contended that, while his right to come in under the judgment alone was not perfected at the time of suit begun, yet, "that, for certain purposes, the court [of equity] recog-"nizes a title by the judgment, inasmuch as the court finds

"the creditor *in a condition to acquire* a power over the "estate by suing out the writ."

For defendant, it was replied, that the statute creating the right to seize lands on *elegit* or execution (13 Edw. 1, Chap. 18) "gives no charge or lien, but only the *option*, "by issuing an *elegit*, of obtaining one;" consequently, that plaintiff's title was not perfect when he began suit; and that he could not maintain his suit by *subsequently* acquiring the mortgage title. And this view was sustained, the court considering, with reference to plaintiff's purchase of the mortgage, that "he has not thereby improved his "original case."

Godfrey v. *Tucker*, 33 Beav., 280.

The proper course in such a case is to dismiss the original bill, and begin a new suit.

Milner v. *Milner*, 2 Edw. Ch., 114.

It is true, neither the receiver nor the Union Trust Company objected by demurrer to the filing of this supplemental petition. Such a mode of objection, is, we believe, seldom, if ever, practiced in a case of mere intervening petitions. But the substance of this objection was made in the answer of the receiver to this supplemental petition, the substance of said answer being that, even if it were true that appellee had paid Holbrook, yet such action was too late, and appellee was barred by the excludatory orders and other proceedings in the case. (Rec., fol. 59-65.)

The objection is not one of mere form, but the ground of it is, that, to allow this subsequent act of appellee set forth in the supplemental petition to be availed of, as a part of appellee's *original* case, would give to such act a

retroactive effect, that would operate a practical fraud upon both the appellants in this case. When the St. Louis and Cairo Railroad Company bought this property and took possession, the matter of this supplemental petition did not exist, and the purchasers had no means of knowing that it ever would exist. They bought supposing, and having a clear right to suppose, that no claim against the property, which had not been perfected and filed on or before July 1, 1881, would be allowed. To charge them with a burden accruing not only after July 1, 1881, but even after they had bought and taken possession, can hardly be designated otherwise than as a legal, if not a moral, *fraud*.

"When the question of *lis pendens* arises upon an "amended bill, it is regarded as an original bill for that "purpose," and, as concerns rights thereby affected, the bill must be taken as filed only when the amendment was made.

Miller v. *Sherry*, 2 Wall, 237.
Griffiths v. *Griffiths*, 1 Hoffm. Ch., 161.
S. C., 9 Paige, 316.

"Where the original bill does not involve the property, but, pending the suit, an amendment is filed alleging *new matter* and involving property not before in litigation, the *lis pendens* created by the amendment will commence from the filing of the amendment, and will not relate back to the commencement of the action so as to affect intervening rights."

Bennett on *Lis Pendens*, §§ 32, 95, 133.
1 Dan. Chy. Pr., *402-3.
Story Eq. Pl., Sec. 904.

This rule applies so as to let in new defenses which would not have availed against the matter of the original

bill. For instance, the statute of limitations, though inapplicable to the cause as originally stated, may be pleaded to an amendment which, in effect, sets forth a fresh ground of action.

Bennett on *Lis Pendens*, Sec. 95.
Schultz v. *Fox*, 53 Md., 42.

So, in this case, while we do not plead that appellee's right of recovery accrued too *long ago*, we do say that it has accrued *too late*, under the rules of limitation prescribed by the court having jurisdiction of the *res*.

"It is necessary, in order to conclude a purchaser by virtue of the judgment, that *by the record* in the case *at the time of the purchase*, the parties to the suit and *the nature of the claim* made to the property *should be so stated that no subsequent amendment will be necessary*. If any amendment is made, *lis pendens* as to the matters and parties involved in the amendment dates from the time it is made. The amending of a bill to show a *new equity* creates a new *lis pendens*."

Freeman on Judgt's, Sec. 199.

The answer of the receiver and the Union Trust company to the appellee's supplemental petition sets forth that there were then no proceeds of the sale in the receiver's hands, nor any assets or funds out of which this claim could be paid. (Rec., fol. 65.) This averment was admitted to be true by appellee. (Rec., fol. 72, 73, (2).)

We submit that, whether we consider the nature of the claim itself or the time and mode of its presentation to the court below, no ground in law or equity can be found for the support of the decree in appellee's favor.

APPELLANT'S POINTS ON THE MOTION TO DISMISS.

I. Appellee objects that the Cairo and St Louis Railroad Company should be a party to this appeal.

To this we reply that, in no possible event, can that company be interested in the result of this appeal. To make the point good, the record should affirmatively show such interest to exist. It shows the contrary. At the time of the foreclosure sale and when this record was made up, that company was insolvent. (Rec., fol. 11.) The mortgage debt more than consumed all the property in the principal cause. The appellee's petition prays for payment out of funds in the receiver's hands only, asks relief only against the receiver and the mortgagee. The decree below awards relief only against such fund, and declares the claim a lien only as against the property under foreclosure. The Cairo and St. Louis Railroad Company did not answer, or in any way interfere in the prosecution of appellee's petition. If the decree below is to stand, the appellants will have to pay this claim, and then, in equity, become the owners of the Holbrook judgment against the Cairo and St. Louis Railroad Company. If that decree is reversed, then appellee will have to suffer the loss, and remain, in equity, the owner of the Holbrook judgment. In neither event will one jot or tittle be added to or taken from the legal or equitable rights or responsibilities in the premises of the common debtor. Appellee's error seems to lie in confounding the whole principal cause with this ancillary proceeding, in which his claim is concerned. It does not follow that every one who is interested in the former is also interested in the latter. One

cause may include a number of separable controversies between different parties or sets of parties to the cause.

Railroad v. *Johnson*, 15 Wall., 8.
Germain v. *Mason*, 12 Wall., 261.
Simpson v. *Greely*, 20 Wall., 157.
Forgay v. *Conrad*, 6 How., 203.

The appeals of *Union Trust Company* against *Souther*, *Same* against *Walker*, *Same* against *Fitzgerald*, in 107 U. S. Rep., were like the case at bar, and it was not deemed essential that the insolvent mortgagor should be a party to those appeals.

The wide difference between the case at bar and *Terry* v. *Abraham*, 93 U. S., 38, cited by appellee upon this point, are too obvious for comment.

Appellee seems to object that the appeal bond here was executed only by one of the two appellants, that the Union Trust Company is not a party to that bond.

It was not necessary that both appellants should sign the bond.

Brockett v. *Brockett*, 2 How., 238.

Appellee also objects that the receiver ought to be brought here into this court. Why not also the clerk of the court and the marshal?

A receiver is but an officer of the lower court, entirely subject to its orders, absolutely indifferent and disinterested, except, of course, where the action or order of the court affects him personally in his personal rights. The decree of the court below simply affects the fund or property in court, and those personally interested therein. Upon what possible ground can a receiver appeal from

an order of the court appointing him, which relates solely to the disposition of the fund or property in court?

In re Colvin, 3 Md. Ch. Dec., 300.
High on Receivers, Sec. 836.

Appellee further objects that the appeal bond runs only to himself, and not also to the Cairo and St. Louis Railroad Company.

Under what conceivable set of circumstances could the appellants here, or either of them, become responsible to the common debtor for the results of this suit?

II. The second point made by appellee is, that "the record "discloses that 'others,' whose names and interests are "not disclosed, were parties to the litigation," but are not made parties to this appeal.

The obvious explanation is that such "others," though interested, perhaps, in other portions of the principal cause, had no interest in the decree *from which this appeal is taken*. The cases cited by appellee all refer to some omission from the record of the names of persons shown by the record to be interested, not generally in the principal cause, but specifically in the particular subject-matter of the appeal. If these authorities are to be read as appellee's counsel seem to read them, no appeal could ever be brought here unless all the parties to the entire cause be also summoned into the court—a proposition absurd on its face and contradicted every day by the practice of this court.

So far as concerns the principal parties to the principal cause, they are named in the title of the cause given in the

record, viz: The Union Trust Company of New York, complainant, and the Cairo and St. Louis Railroad Company, Willis Cauble and Henry Holbrook, defendants. (Rec., fol. 1.) The title of appellee's own petition discloses the same names. (Rec., fol. 35.)

Miltenberger v. *Logansport Ry. Co.*, 106 U. S., 305-6.

III. The last point made by appellee is that the decree below is for over $15,000, and interest since May 29, 1882, whereas, the court below required an appeal bond in the penal sum of but $500.

The court below, except under unusual circumstances, is the final judge of the amount of the bond.

But counsel object that in *Catlett* v. *Brodie*, 9 Wheat., 553, and *Stafford* v. *Union Bank*, 16 How., 135, this court required the bond to be in a sum sufficient to cover the whole amount of the decree, notwithstanding there might be a fund in court or property under the court's control, which would constitute ample security for the amount of the decree.

Anticipating, apparently, our excuse that in this case there was such security in court, counsel warn us that similar reasons against the practice for which they contend were urged in the latter case in a dissenting opinion, but were overruled by the majority of the court.

All this is of interest as matter of historical information, perhaps, but not otherwise, we conceive.

The dissenting opinion of Justice Catron in the last mentioned case has since been formulated into a rule,

and has governed the practice of this court for twenty years past.

U S. Supreme Ct. Rule 29.
Rule 32, 6 Wallace Rep., v.
Rubber Co. v. *Goodyear*, 6 Wall., 153.
Jerome v. *McCarter*, 21 Wall., 31.
Kountze v. *Hotel Co.*, 107 U. S., 387.

Respectfully submitted.

S. Corning Judd,
Wm. Ritchie,
Edward B. Esher,
Edward S. Judd,
Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM A. D. 1887

No. 64.

THE UNION TRUST COMPANY OF NEW YORK AND THE CAIRO AND ST. LOUIS RAILROAD COMPANY,
Appellants,

WILLIAM R. MORRISON,
Appellee.

STATEMENT AND BRIEF OF APPELLEE

CHARLES W. THOMAS,
of Counsel for Appellee

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1887.

THE UNION TRUST COMPANY OF NEW YORK AND THE ST. LOUIS AND CAIRO RAILROAD COMPANY, *Appellants*,

—*vs.*—

WILLIAM R. MORRISON, *Appellee.*

No. 64.

STATEMENT.

On the 2d day of October, 1871, the Cairo and St. Louis Railroad Company, which is not a party to this cause, issued $2,500,000 of its bonds, payable October 2d, 1901, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October in each year. (Rec. fol. 3–4).

On the same day, in order to secure the payment of said bonds, the Company executed and delivered to the Union Trust Company of New York, one of the appellants, a deed of trust, whereby it conveyed to the grantee in trust, all of its property then held or owned by it or thereafter to be acquired, and all the rents, issues and profits thereof. The deed further provided that the Railroad Company, in addition to the semi-annual interest on the bonds, should pay the sum of $12,500 on the first days November and May in each year, as and for a sinking fund for the purchase and redemption of the bonds themselves, and that if any default should be made in the payment of the interest or the sinking fund, and such default should continue for three months, the trustee

might take possession of the mortgaged property and operate it by such agents, managers, receivers, &c., as it might appoint. The deed of trust further provided that if any installment of interest remained unpaid for six months the whole debt might be declared due in the manner therein provided for. (Rec. fol. 4–5).

The Company made default in the payment of the interest due October 1st, 1873, and paid nothing thereafter. (Rec. fol. 6).

On the 8th day of November, 1877, more than four years after the default, the Union Trust Company declared the whole debt due in the manner prescribed by the deed of trust. (Rec. fol. 7), and instead of taking possession, filed its bill in the Circuit Court for the Southern District of Illinois, on the 6th day of December, 1877, (Rec. fol. 8), praying for a foreclosure of the deed of trust and a sale of the property to satisfy the debt, for the appointment of a receiver *pendente lite*, and for general relief.

The Court, on the day the bill was filed, appointed one Henry W. Smithers, receiver of the property, (Rec. fol. 9), and he took possession on the same day and operated the road under the directions of the Court, until February 1st, 1882, when he delivered it to the grantee of the purchasers at the sale under the foreclosure decree, the appellant, the St. Louis and Cairo Railroad Company. (Rec. fol. 12).

The decree of foreclosure was entered May 16th, 1881. (Rec. fol. 10–11). It found that there was due on the bonds the sum of $4,301,157.53, and ordered a sale by the master if that sum was not paid by the 26th day of May, 1881, ten days after the decree. It also contained a provision that all inter-

vening petitions should be filed by July 1, 1881. (Rec. fol. 13).

No payment being made, a sale was had to Josiah A. Horsey and Charles J. Canda, on the 14th day of July,, 1881, of all the railroad property mentioned in the trust deed for the sum of $4,000,000, and the sale was approved by the Court on the same day. (Rec. fol. 11).

On the 22d day of December, 1881, the master acting under the order of the Court, made a deed to Horsey and Canda, conveying all the property so sold, "subject to the lien of any and all claims against the said railroad property and asssets which were then before said Court by intervening petition, and which should be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by the said mortgage or deed of trust." (Rec. fol. 11).

On the 30th day of January, 1882, Smithers, the Receiver, acting under an order of the Court, conveyed all his interest in the railroad property and assets, to Horsey and Canda, the purchasers at the master's sale. (Rec. fol. 12).

On the 31st day of January, 1882, Horsey and Canda conveyed the property to the appellant, the St. Louis and Cairo Railroad Company, and on the next day, the Receiver, acting under an order of the Court, delivered possession of the railroad to the Company and turned over to it all the assets in his hands. (Rec. fol. 12).

The amount of these assets is not disclosed by the record, nor is there any source from which the Court can gather any information as to their nature.

THIS MAKES THE MAIN CASE.

The claim of the intervenor is based upon the following facts:

On the 26th day of November, 1872, one Henry Holbrook recovered a judgment against the Cairo and St. Louis Railroad Company, in the Circuit Court of St. Clair County, Illinois, for $9,500 and costs. Having caused an execution to issue, which was returned by the order of his attorney, he caused an *alias* execution to issue on the judgment on the 27th day of October, 1874, more than a year after the Company had made default in the payment of interest on its bonds and placed it in the hands of the Sheriff of St. Clair County, to execute. Most of the rolling-stock and personal property of the defendant Company being at that time in the officer's county, he threatened to seize it under the execution.

The Company, believing that the judgment had been fraudulently and wrongfully obtained, filed its bill in equity to restrain Holbrook and the Sheriff from proceeding any further to collect the judgment and from taking the property under the execution. Upon this bill a temporary injunction was granted. The cause came on to be heard in February, 1877, and the injunction was dissolved and the bill dismissed. From this order an appeal was taken by the Company to the Supreme Court of Illinois, which at its June Term, 1879, affirmed the decree of the lower Court.

In order to procure the injunction mentioned, and prevent the Sheriff from seizing its rolling stock and hindering and crippling it in the operation of its road, it became necessary for the Company to give an

injunction bond, conditioned for the payment of the judgment in case the injunction should be dissolved. Such a condition is required by the laws of Illinois, Sec. 8 of Chap. 69, Rev. Stat. of Illinois, being as follows:

> "Before an injunction shall issue to enjoin a judgment the complainant shall give bond to the plaintiff therein in double the amount of the judgment, with sufficient security, approved by the Court, judge or Master, conditioned for the payment of all moneys and costs due the plaintiff in the judgment, * * ."

Without such a bond no injunction could issue. The Company applied to Col. Morrison, the intervenor, to become surety upon its injunction bond. He complied with the request and signed the bond.

After the injunction was dissolved by the judgment of the Supreme Court of Illinois, Holbrook sued Morrison, on the injunction bond, and on the 30th day of September 1880, recovered a judgment against him for $13,965, the amount of the enjoined judgment with interest.

The Company had been compelled in many cases to prosecute appeals and procure sureties or bonds, and the Receiver, a few months after his appointment, and several years before the Intervenor filed any petition in the cause, presented to the Court a list of these sureties, and obtained leave to protect them from loss. In his petition, he particularly referred to the Holbrook case which was then pending and undetermined. He set out that all the sureties executed the appeal and other bonds at the instance and request of the Company, having no personal interest in the subject matter of any of the suits, and that

their action had been to the benefit of all persons interested in the property, in preventing its sacrifice. (Rec. fol. 17). He asks the advice and direction of the Court.

On the 4th day of February, 1878, the Court directed the Receiver to use any money he might have after meeting operating and repairing expenses, in protecting and saving harmless such sureties as in his judgment ought to be so protected in equity and good conscience, by reason of the protection afforded the property and assets of the Company by or through the giving of such bonds or any or either of them. (Rec. fol. 26). This was in effect a declaration by the Court of the superior equities of these sureties whose action had protected the *corpus* of the property, and an adjudication of their rights.

On the 30th day of June, 1881, the Receiver not having funds enough applicable to the purpose to protect Morrison, and a decree of sale having been entered in the main case, Morrison intervened in his own behalf and filed a petition setting up the facts above recited, alleging the inability of the Receiver to save the petitioner's property from sale under the Holbrook judgment, and praying for such relief as to equity might seem meet.

No action was taken by the Court on this petition and Morrison, on the 29th day of May, 1882, in order to save his property, paid the Holbrook judgment, which then amounted to $15,352.19, and on the 5th day of June thereafter, filed his supplemental petition in the main case setting up the payment and praying to be reimbursed out of the fund.

The matter was referred to a Master, who reported the facts as claimed by the petitioner, but was of

opinion that petitioner was barred by the order of the Court limiting the time within which to file intervening petitions in the main cause, to July 1, 1881. Exceptions were taken by the petitioner to the report and upon the hearing the Circuit Court, the Circuit and District Judges both sitting and concurring, decreed that there was due Col. Morrison the sum of $15,352.19 with interest thereon from May 29, 1881, and that he had an equitable lien upon the property embraced in the main cause for its payment. From this decree the Union Trust Company of New York and the St. Louis and Cairo Railroad Company, which became a party after the decree, prosecute this appeal.

The whole record in the case is not before the Court, and the stipulation of counsel made for the purpose of shortening the record, is unfortunately lacking in a material matter. It fails to show what amount of money was earned by the Receiver after Morrison's original petition was filed and how much of that money was turned over to the St. Louis and Cairo Railroad Company when the Receiver was discharged. That money was a fund out of which Morrison should have been protected under the order of Court made at the Receiver's instance.

BRIEF OF THE ARGUMENT.

The Constitution of Illinois of 1870, adopted before the deed of trust from the Cairo and St. Louis Railroad Company to the Union Trust Company of New York was made, contained the following provision:

> "The rolling stock, and other movable property belonging to any railroad company or corporation

in this state, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals. * * " Art. XI, Sec. 10.

The law of Illinois in respect to mortgages of personal property (Chap. 95, Rev. Stat.) requires the instrument to be acknowledged before a Justice of the Peace in the town or district where the mortgagor resides, and provides that the Justice shall enter a description of the mortgaged property on his docket, and limits the duration of the lien to two years. The railroad mortgage made by the Cairo and St. Louis Railroad Company was made October 2d, 1871, after the Constitution went into effect. Holbrook issued his *alias* execution against the Company on the 27th day of October, 1874, and if the Constitution of Illinois had the effect of declaring rolling stock to be personal property, the mortgage to the Union Trust Company was no longer a lien when the execution was placed in the hands of the Sheriff. It was then an unsettled question whether an ordinary railroad deed of trust not acknowledged as a chattel mortgage created in Illinois any lien upon the rolling stock of the railroad company. There was much litigation in the Courts and the matter was not set at rest until this Court, in *Hammock v. Loan and Trust Co.*, 105 U. S., 77, held that the chattel mortgage act of Illinois had no reference to railroad property, and the Supreme Court of Illinois, in *Peoria & Springfield R. R. Co. v. Thompson*, 103 Ill., 187, substantially decided the question the same way.

When Holbrook therefore sued out his *alias* execution and placed it in the hands of the Sheriff the railroad as a going concern was in great peril, either

real or apparent. If the Sheriff seized its rolling stock to satisfy either a paramount or a subordinate lien, it would be impossible for it to perform its public functions, which it had agreed with the State to perform when it accepted its charter. Whether the lien of the execution was or was not paramount was an unsettled question. Holbrook was proceeding upon the theory that his lien was prior to the deed of trust. The company was convinced that it could set aside Holbrook's judgment as fraudulent. It had been left by the trustee in the deed of trust in full possession of the property although it had been more than a year in default. It was openly insolvent and unable to meet the payments required by the deed of trust, but it recognized the duty imposed upon it by its position, namely, to save the property and preserve its unity and usefulness for whomsoever might be entitled to it. In order to do so it must act promptly. Under the advice therefore of learned counsel, who must have appreciated the doubtful character of the question raised by Holbrook's claim, it procured an injunction restraining Holbrook from proceeding under his execution. In order to do this it made a bond and Col. Morrison became its surety.

This bond was given to prevent a seizure of the rolling stock by the Sheriff, and it served that purpose, and enabled the company to preserve the property and maintain its business relations with the public until the Receiver was appointed.

This Court said, in *Union Trust Co. v. Illinois Midland Co.*, 117 U. S., at p. 455, that property subject to liens, claims and debts of various characters and ranks which is brought within the cognizance of a court of equity for administration, and conversion

into money and distribution, is a trust fund. It is to be preserved for those entitled to it. That a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway, and that all persons who deal with it do so with a knowledge of the public duty with which it is burdened.

It was in the performance of this duty that the Cairo and St. Louis Railroad Company involved Col. Morrison. If it had failed to get an injunction bond its rolling stock would have been seized,—the operation of its road suspended—its complex and numerous business relations disturbed or destroyed and its public duties left unperformed. It was enabled by his assistance to preserve the property as a unit for the benefit of the bondholders, and to continue in the exercise of the public functions it had assumed.

The case would not have been otherwise if it had been at the time settled by the Courts that Holbrook's execution was a lien subordinate to that of the deed of trust. The practical effect would have been the same. The Constitution gave him the right to subject the rolling stock to sale under his execution, and he could have sold it subject to the prior lien and severed it from the realty and acquired a right of user until the deed of trust could be foreclosed. This would have been disastrous to the company's business, and would have destroyed the unity and usefulness of the property.

The Receiver was right when he said to the Circuit Court in his sworn petition, filed in February, 1878, that these sureties saved the property from being sacrificed, and preserved it for the bondholders.

It appears from the record that it had become a matter of course in the Circuit Court for the Southern District of Illinois, to protect sureties on bonds of railroad companies where the property of such companies came afterwards into the hands of the Court upon a foreclosure. The Master in his report cites three such cases, two of which grew out of the foreclosure of the railroad mortgage mentioned in this case. (Rec. fol. 75). The ground assumed by the Circuit Court was that the railroad company was charged with the duty of defending the unity and integrity of the property and of preserving it intact, and that if it became necessary to give appeal and other bonds in order to do so, the sureties might look to the property which they were the means of preserving until the jurisdiction of the Circuit Court attached. If the Union Trust Company had foreclosed its mortgage, when it might have done so, some months before Holbrook's execution issued, he would have been compelled to come into the Circuit Court with his claim, but the Company was permitted to operate the road long after its default under the deed of trust, and the property was left liable to seizure under Holbrook's execution, and the company in caring for and preserving the property for the bondholders, whose trustees had been guilty of great negligence in not asserting their rights, was compelled to involve persons who had no interest in the matter. If the trustee had acted within a reasonable time after the company's default there would have been no occasion for the company to put forth any efforts to save the property, and in so doing to render liable men who were willing to take great risks rather than have the railroad imperilled or ruined.

The line of cases relating to priority in the distribution of funds arising from a foreclosure sale of a railroad, which have been decided by this and other Courts, beginning with *Fosdick v. Schall*, 99 U. S., 235, do not seem to bear directly upon the question made here. Those cases are collected in a note to the case of *Blair v. St. Louis H. & K. R. Co.*, 22 Fed. Reporter, 471, and the history of doctrine governing the distribution of such funds, is traced. It may justly be said, however, that from them all may be deduced the general doctrine stated by Judge Love in *Farmers' Loan and Trust Co. v. Mo., I. & U. R. W. Co.*, 21 Fed. Reporter, 264, that the property of a corporation is to be treated in equity as a trust fund primarily for the payment of its debts—that this trust is to be administered by no means solely for the benefit of lien creditors—that lien creditors have no greater equity to payment out of the effects of an insolvent corporation than general creditors, and that it not unfrequently happens that the unsecured creditor has in equity claims superior to the lien creditor upon the estate of the insolvent. The secured creditor is ordinarily entitled to priority because a court of equity recognizes his legal lien, but that cases arise in which that lien is postponed to a superior equity possessed by some unsecured creditor.

The difficulty of making a rule to fit all cases must seem apparent. Each case must ordinarily rest upon its own facts, and the Court must in each case determine whether the unsecured creditor is in a position to claim an equity superior to that of the secured creditor. It is somewhat confidently assumed that the Circuit Court did not err in holding that under

all the facts of this case, Col. Morrison, who assumed a liability at the instance of the railroad company, in order to preserve this property for the secured creditors, at a time when their own negligence had exposed it to attack, had an equitable lien upon it, superior to theirs to the extent of the loss suffered by him in that behalf.

All things must be presumed in favor of a decree. The record brought to the Appellate Court must show all the facts which were before the Court below and which might have influenced it to act, and if the record, as brought up, does not show those facts the decree will stand.

As has been shown in the statement, the record here is silent as to the monies, property and assets turned over by the Receiver to the St. Louis and Cairo Railroad Company. It shows affirmatively that the Receiver, instead of turning over the property in his hands to Horsey and Canda, the purchasers at the foreclosure sale, turned it all over to the Company mentioned. (Rec. fol. 12). What it consisted of is not shown. It might be that the Receiver handed over to the appellant railroad company half a million dollars earned by him while operating the road. It might be that the Circuit Court was influenced by some such fact as this to make the order made in this case, that the money should be paid to the intervenor by a short day, and if this was not done, he might apply for a further order. It might be that the money turned over by the Receiver to the St. Louis and Cairo Railroad Company, was money out of which it was the duty of the Receiver, under

It is insisted, however, that the intervening petitioner in this case was barred by the decree of the Court, and that he came too late. The decree entered May 16, 1881, directed that "all persons having claims or liens against the said railroad and property or against the proceeds thereof *and not then before the Court*, should file intervening petitions by July 1st, 1881, or be barred and excluded from any and all participation in or benefit from or under the decree or from the property and assets therein mentioned or the proceeds of the sale of the property under the decree." (Rec. fol. 12).

It is not necessary to discuss here the question of the power of a Court of Equity having in charge a trust fund, to prevent any one interested in that fund from appearing at any time while the fund is in Court and presenting his claim for adjudication. It might be said that the only way in which the presentations of claims could be prevented would be by distributing the fund, and a Court of Equity, solicitous that a trust fund should reach the proper distributees, would delay the distribution that all might be heard, rather than hasten it so that some might obtain an undue advantage.

Be that as it may, a reference to the facts of this case will show that Col. Morrison was not affected by this order. In the first place it expressly excepted all persons whose claims were before the Court, and when it is remembered that the Receiver, in February, 1878, (Rec. fol. 15), called the attention of the Court of his own motion to Col. Morrison's claim, and procured an adjudication of the superior equity of that claim which has stood unchallenged and unappealed from to this time, (Rec. fol. 27), it will be seen

that the exception in the order included him and others in like circumstances. His claim was "before the Court." The facts and circumstances upon which it was based had been laid before the Court by its own officer and the Court, recognizing its equity, had authorized the Receiver to protect the intervenor from liability. All that had prevented this from being done was lack of funds. (Rec. fol. 40–56.)

The petitioner however, although he was was within the exception in the Court's order, filed his petition before July 1, 1881, setting up more fully than was done by the Receiver, the facts out of which his liability arose. (Rec. fol. 35). He also showed that Holbrook had sued him on the bond and obtained judgment and that he had property subject to the lien of that judgment. He certainly had a right to expect at that time, when the Court had decreed a sale of the railroad, when the justice of his claim to have his property protected from sale to satisfy Holbrook, had been adjudicated and the only reason why it had not been protected was lack of funds in the Receiver's hands—that the Court would make an order in his behalf without the necessity of any further efforts on his part. In this he was mistaken. He was compelled to pay Holbrook's judgment to save his own property. The record, at the time of the sale under the foreclosure, showed all the facts out of which the liability arose—it further showed that the intervening petitioner had property which must be applied to the payment of the Holbrook judgment unless the fund in the hands of the Court should be used to protect him; and it further showed that the Court had, of its own motion and on the suggestion of its own officer,

declared his equity to be superior to that of the Union Trust Company.

The purchasers at that sale bid with a full knowledge of these facts and with a full knowledge that the property was sold subject to all claims then before the Court which might afterwards be established as prior liens to the mortgage. The record disclosed that Morrison must pay the judgment. He had told the Court that his property was under its lien and would be taken, and that unless the Receiver protected him, he must pay. Counsel are in error when they say he had no property subject to that lien. (Rec. fol. 90). His subsequent payment was the very thing he had said he would be compelled to do, and his supplemental petition setting up that payment, related back to the original petition in which he disclosed his liability to pay, and was a mere supplement thereto, and not a petitition setting up a new claim as has been supposed.

If the Receiver had been able so to do, it is to be presumed that under the order of the Court he would have paid Holbrook's judgment and released the petitioner from liability, but inasmuch as the earnings of the road, up to the time of the filing of Morrison's petition, were not sufficient to admit of this, the action of the petitioner in paying the judgment himself, added nothing to his previously established equity, but merely produced the effect which should have been produced without his intervention. He was entitled to protection and ought not to suffer because he was compelled to protect himself after it was apparent that the fund was either inadequate or would not be applied for that purpose.

The order of the Court barring claims was clearly intended to prevent the intervention of new parties with claims of which the Court was not already apprised, and had no reference to any parties who had come into Court with claims either complete or inchoate. If it appeared of record at the time of the foreclosure sale that the petitioner must pay unless he was protected out of the fund, and that he had property subject to execution and under the lien of Holbrook's judgment, then it may be reasonably said that the subsequent payment of that judgment by the petitioner after it became apparent that he must pay it and that the fund could afford him no relief, is a fact which was so foreshadowed by the case as it was presented, as to have a just relation to it as an integral and necessary part of it. If the petitioner had not come into Court until after the sale and the payment of the judgment, a case would have been presented against which the limiting order of the Court was directed, and to which the argument of the learned counsel for the appellants would apply with conclusive force.

It is said by the learned counsel for appellants, in their argument—

I. That the evidence does not show that appellee has ever paid the Holbrook claim.

A very cursory examination of the record will suffice to show that this contention is not worthy of serious discussion. The fact that Morrison borrowed the money to pay Holbrook with, has no such effect as counsel seem to think, and none of the cases cited by them on this point have any application. Their whole argument seems to be based upon the idea that Morrison claims here a right to be subrogated to

Holbrook's rights, when there is no question of subrogation in the case. He is not a surety claiming contribution from a co-surety—he is a salvor who saved the property and preserved its integrity for the benefit of whomsoever might be entitled to it. He did not substitute one obligation for another as was done in the cases cited by counsel, he absolutely and forever discharged and satisfied the obligation by an actual payment of money. Where he got the money is of no consequence. He may have found it, or received it as a present, or borrowed it and mortgaged his property to secure it, without affecting his rights, if he actually paid it to Holbrook as he did. If he had given Holbrook a note for it the authorities cited by counsel would have some application. This was what was done in *Romine v. Romine*, 59 Ind., 351, and in other cases cited. There is a manifest distinction between borrowing money to pay a judgment, and giving a note to the judgment creditor to effect the same purpose. One pays the debt and the other does not.

It is further said—

II. That the decree was for too large a sum.

It will be seen that the amount allowed Morrison was the exact sum that he lost by reason of becoming surety on the injunction bond, and if he was entitled to anything, he was entitled to the amount he lost.

It is further urged that Morrison had no superior equities. This has been discussed above, but it may be well to notice one matter not yet touched upon by us. It is said that Morrison took collateral security

in the shape of a chattel mortgage, and did not rely upon the assurances of the Company that he would be protected if he became surety on its injunction bond. The injunction bond was made on November 24, 1874, (Rec. fol. 42), while the chattel mortgage was made June 26, 1875. (Rec. fol. 41). The mortgage was a voluntary but ineffectual act on the part of the Company to secure Morrison, long after his liability had attached, and had nothing to do with the execution of the bond. It was subordinate to the lien of the railroad deed of trust and amounted to no more than an acknowledgment of Morrison's services in protecting the property. He could not take advantage of its provisions without interfering with the operation of the road and doing the very thing he prevented by signing the injunction bond. The position of counsel in reference to this mortgage is somewhat inconsistent. On page 3 of their statement they say that there is no proof of any such mortgage, and on page 23 they urge that there was such a mortgage and treat it as cotemporaneous with the signing of the injunction bond. This, however, is only one instance of the confusion into which they have fallen. On page 1 of their statement they show that the railroad company, when it made the deed of trust, conveyed all of its property of every kind whether then held or to be afterwards acquired, while on page 29 they base an argument upon the fact that the appellee did not show that the company had no property but that covered by the mortgage. It is difficult to follow counsel through an argument which is so apparent a departure from the case as made by the record.

The fundamental error that this is a claim for subrogation, so pervades and colors it as to put most of

it outside the case. The chief question is not whether Morrison is subrogated to Holbrook's rights, but whether, acting in good faith and in the presence of what was or seemed to all parties to be, a great peril to the railroad property, he so acted, as to save the property from that peril and thereby involved himself.

GUSTAV KOERNER,
CHARLES W. THOMAS,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM A. D. 1887.

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Appellant,

vs.

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Appeal from the Circuit Court of the United States for the Southern District of Illinois.

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No. 64.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

And now comes the said appellee, William R. Morrison, by his counsel, and moves this Honorable Court to vacate the *supersedeas* herein and dismiss the appeal, assigning as special grounds of this motion, the following:

I. The Cairo and St. Louis company, a party to the main case, and whose interests will be materially affected by the judgment of this Court in this cause, is not a party thereto.

II. There were parties to the suit below whose interests are not disclosed and who are not made parties here.

III. Henry W. Smithers, receiver, who is a party of record to the litigation arising out of the pre-

sentation of appellee's claim, and interested in the determination of this cause, is not a party to this appeal.

IV. The decree below was in favor of appellee for the sum of $15,352.19, with interest thereon from May 20th, 1882, to May 5th, 1884, and the appeal bond, which was made to operate as a *supersedeas*, is in the penal sum of $500, and does not afford appellee the security to which, by law, he is entitled.

V. The appeal bond does not run to the proper obligees.

STATEMENT.

The Union Trust Company, of New York, one of the appellants, on the 6th day of December, 1877, filed a Bill in Equity in the Circuit Court of the United States for the Southern District of Illinois, against the Cairo and St. Louis Railroad Company, to foreclose a railroad mortgage given to secure $2,500,000 of the latter company's bonds and for the appointment of a receiver. (Rec. p. 8.) The Circuit Court appointed one Henry W. Smithers, receiver on the same day, and that officer took immediate possession of the property (Rec. p. 9.)

On the 16th day of December, 1881, a decree of sale was rendered in the foreclosure suit, and on the 14th day of July, 1881, the property mortgaged was

sold thereunder to Josiah A. Horsey and Charles J. Canda, for $4,000,000. (Rec. p. 11.)

This sale was made subject to "the lien of any and all claims which were then before the Court by intervening petition, and which should be, upon final determination and adjudication, decreed to be paid as liens paramount" to the mortgage. (Rec. p. 12.)

On the 30th day of June, 1881, the appellant filed in the cause an intervening petition, setting forth in substance, that one Holbrook, having sued out executions against the railroad company prior to the foreclosure proceedings and being about to cause its property to be seized thereon, the Company procured an injunction in a State Court and in order to make it effectual to restrain the seizure, was compelled to give an injunction bond in the sum of $19,000 upon which appellee, at the Company's request, became a surety, and that such proceedings were had in the injunction case, that the injunction was dissolved and appellee became liable in damages as surety on the bond, and Holbrook recovered a judgment against him as such surety for $13,965 and costs. He asks the Court to protect him from said judgment. (Rec. pp. 36 to 41.)

The petition further alleges and shows by proper exhibits, that the Receiver on the 30th day of June, 1881, filed in the main cause his *ex parte* petition, a copy of which is in the record, (pp. 47–51) asking the court for leave to protect petitioner from liability on the said bond, which was given him by the court, and showing further that the Court established by an order the superior equity of petitioner and authorized his protection by the Receiver.

On the 5th day of June, 1882, appellant filed a supplemental petition in the cause, setting up a payment by him of the judgment, and praying to be reimbursed. (Rec. pp. 57, 58.)

These petitions were both answered by the Union Trust Company of New York, and Smithers, the receiver, who was a party of record to the litigation and interested in the decree, the Receiver alleging among other things, that he had not been receiving earnings enough to protect the petitioner.

On the 5th day of May, 1884, the Circuit Court found that there was due appellee $15,352.19, with interest thereon from the 20th day of May, 1882, and that he had an equitable lien for the payment thereof upon the property embraced in the principal cause, and which was sold as aforesaid, and ordered that in default of payment on, or before, the first Monday of "September next" the petitioner have leave to apply to the court for a further order respecting the payment thereof. (Rec. p. 98.)

On the 7th day of May, 1884, one of the appellants, The Cairo and St. Louis Railroad Company, appeared in the cause for the first time, and by intervening petition, showed an interest in the property as a subsequent purchaser, and asked to be made a party for the purpose of prosecuting an appeal from the decree made in favor of appellant. (Rec. pp. 99 to 101). The request was granted by an order of the Circuit Court, and both appellants prayed an appeal. (Rec. p. 103). The appeal was allowed if The St. Louis and Cairo Railroad Company should enter into bond for that purpose, within thirty days, in the penal sum of $500, running to William R. Morrisod as obligee, with S. Corning Judd as surety.

said bond to be approved by the court, and the appeal to operate as a *supersedeas*. (Rec. p. 103).

On the 9th day of May, 1884, the appeal bond was filed, signed only by one of the appellants, The Cairo and St. Louis Railroad Company, and conditioned that both appellants shall prosecute the appeal with effect and answer all damages and costs if they shall fail to make good their plea.

BRIEF OF THE ARGUMENT.

I.

It appears from the record that the Cairo and St. Louis Railroad Company is responsible to appellee for the amount of this decree in case the same should be reversed, and appellee should be compelled to resort to his remedy against it. The appellee was surety for the Company on its injunction bond and liable over to him for the amount he paid, unless this decree is sustained. Its insolvency has no effect upon its legal right to be heard. That might be urged by appellee as strengthening his case upon a hearing on the merits, but it can have no weight as depriving that Company of the privilege of defending its rights, whatever they may be, which are to be affected by the judgment of the Court sought by this appeal.

The appeal bond runs only to the appellee, Morrison, and he alone is protected by it. The Cairo and St. Louis Railroad Company is either not in Court here, or there is no sufficient appeal bond.

If the praying of the appeal in open Court had the effect of carrying all the parties interested in the decree into this Court, the bond should have been made as required by law, so as to protect them all.

The Cairo and St. Louis Railroad Company is as much interested in maintaining this decree as the appellee, and is a necessary party to the appeal.

Terry v. Abraham, et al., 93 U. S. 38.

In the case cited Terry did substantially what was done by these appellants, and Mr. Justice Miller, who rendered the opinion of the Court, after expressing a doubt as to the propriety of such a proceeding, said that it was very clear that no modification of the decree could be had here to the prejudice of those who were parties below and not parties here.

What has been said as to the necessity of having the Cairo and St. Louis Railroad Company before the Court on this appeal applies with probably greater force to Smithers, the Receiver, who was a party of record to the litigation arising from the presentation of appellee's claim.

II.

The record discloses that "others," whose names and interests are not disclosed, were parties to the litigation. (Record p. 8.) They should be parties to this appeal and for want of them it should be dismissed.

Owing and others v. Kincannon, 7 Pet., 399;
Demale v. Stump, 8 Pet., 526;
Smith v. Clark, 12 How., 21;
The Protector, 11 Wallace, 81.

III.

The appeal bond which operates under the order of the Court, as a *supersedeas*, is not sufficient to support the appeal.

The first case in which the question of the amount of an appeal bond, where the appeal bond is to act as a *supersedeas*, is involved is *Catlett v. Brodie*, 9 Wheat. 553. There this Court held that the bond must be sufficient to secure the whole amount of the judgment; and if it was deficient in that respect the Court would make an order dismissing the cause unless a proper bond was filed by a day fixed.

This Court, again, in the case of *Stafford v. Union Bank, &c.*, 16 How. 135, for the express purpose of establishing a rule of practice in such cases, and seeming to recognize the necessity for such a rule, announced that where an appeal was to operate as a *supersedeas* it could not be sustained unless the bond was in a sufficient sum to secure the judgment or decree. The dissenting opinion of Mr. Justice Catron, shows that the position assumed by appellants in this case with respect to the lien given by the decree as a security for its payment is unsound, and opposed to the decisions of this Court.

GUSTAV KOERNER,
CHARLES W. THOMAS,
Attorneys for Appellee.

125-591

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

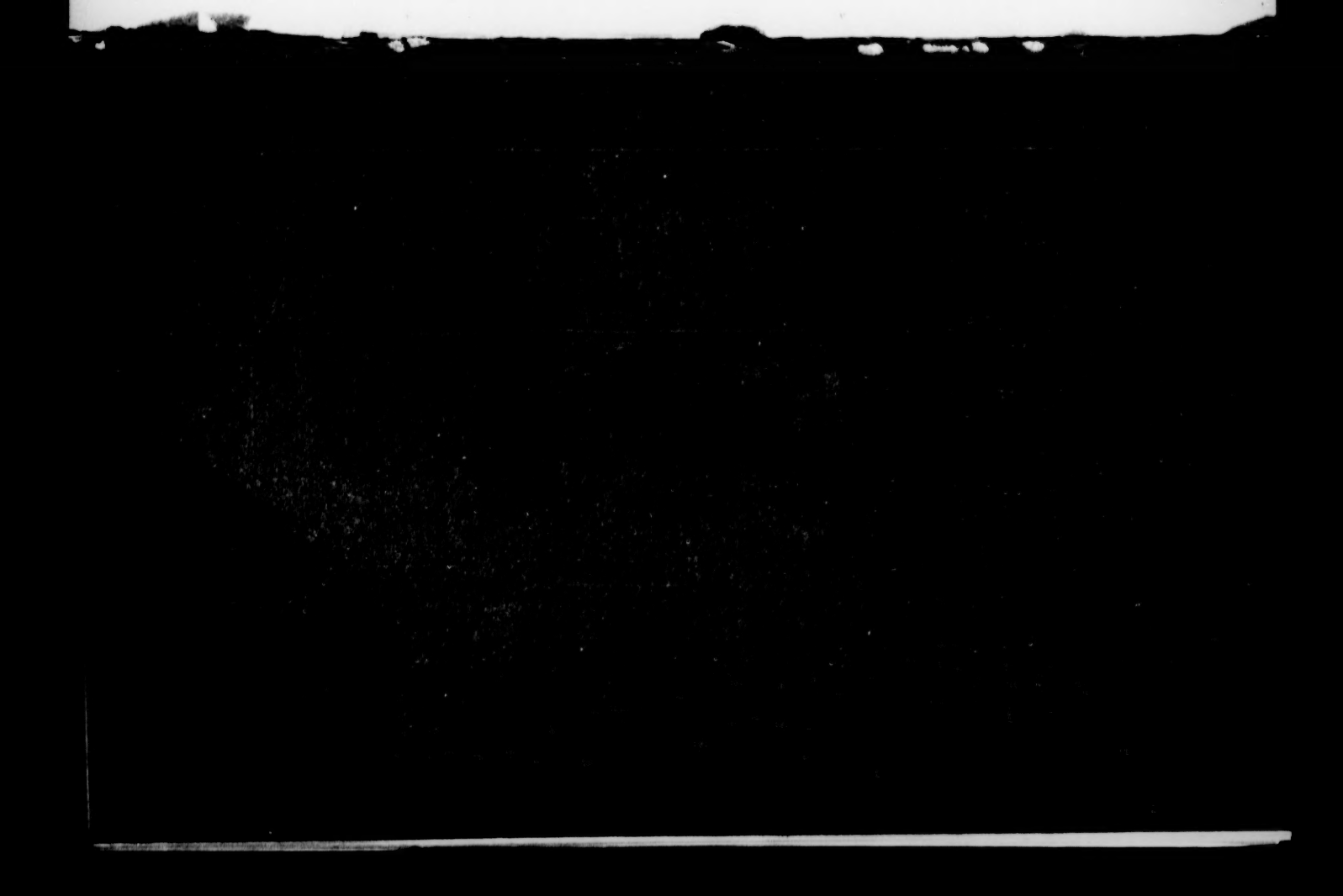
THE UNION TRUST COMPANY OF NEW YORK AND THE ST. LOUIS & CAIRO R. R. CO.,
Appellants,
vs.
WILLIAM R. MORRISON,
Appellee.

No. 53.
Appeal from United States Circuit Court, Northern District of Illinois.

PETITION FOR REHEARING.

S. CORNING JUDD,
WM. RITCHIE,
E. S. ISHAM,
Counsel for Appellants.

BARNARD & GUNNISON, PRINT.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

THE UNION TRUST COMPANY OF NEW YORK AND THE ST. LOUIS & CAIRO R. R. CO.,
Appellants,
vs.
WILLIAM R. MORRISON,
Appellee.

No. 64.

Appeal from United States Circuit Court, Northern District of Illinois.

PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

The petitioners, the appellants herein, respectfully pray this honorable court for a rehearing of the above cause; and for reasons therefor they assign the following, in support whereof they submit the accompanying brief.

First. In the opinion herein, the court has assumed that the receiver, in the exercise of his discretion under the order of February 4, 1878, failed to protect the appellee, as surety, simply for lack of funds wherewith to pay

the Holbrook judgment, and not because he deemed the appellee's claim unjust. Such inference was material, if not absolutely essential, to the decision arrived at.

It is submitted, that, so far as the record discloses anything upon this point, it shows that the receiver must have rejected Mr. Morrison's claim, not for lack of funds merely, but because it was unjust.

Second. In the opinion, the appellant, the St. Louis and Cairo Railroad Company, is considered and treated as identical, in fact and in law, with the mortgage bondholders; and notice to the latter is held sufficient to affect the property even in the hands of the former.

It is submitted that the record does not support such a conclusion.

Third. In the opinion it is argued that there was a "diversion" of funds by the receiver within the rule of *Fosdick* v. *Schall*, 99 U. S., 235, and that the funds so diverted would have sufficed to pay appellee's claim; or, if not, that the *onus* of showing the reverse lay upon appellants.

It is submitted that there is nothing in the record to show that there was any diversion, and that the conditions of the suit were such in the court below that the appellants and the receiver could not lawfully, if they would, have offered any evidence upon the question; and further, that even if this court should feel justified in the inference that there was a "diversion," and that the amount diverted would have sufficed to pay this claim, yet there is nothing whatever to show that there were not *other* claims of equal equity with appellee's, and that the aggregate of such claims did not exceed the amount so "diverted."

Fourth. In the opinion it seems to be held that the doctrine of subrogation, which appellants have invoked, is inapplicable here, because appellee did not, in terms, claim to be subrogated to the lien of the Holbrook judgment—because the "claim was (not) *presented* in any such view."

It is submitted that the legal status of the claim and the principles of law consequently applicable thereto, must be determined solely by the circumstances which disclose its nature and the relations of the parties, and not by the special theory which the claimant's counsel may entertain regarding it, or the special view in which it may be presented; and that the circumstances here are such that the doctrine of subrogation is the only one upon which this claim can rest, or, if not, that, nevertheless, THE LAW, AS ILLUSTRATED BY THE DOCTRINE OF SUBROGATION, TREATS A SURETY, *so far as the rights of third persons are concerned*, AS IDENTICAL IN INTEREST WITH HIS PRINCIPAL, *and as subordinate in his rights to such third parties.*

Fifth. The facts disclosed in *Cairo & St. Louis Railroad Company* v. *Holbrook*, 92 Ill. Rep., 297, show the inequitable nature of appellee's claim.

Wherefore your petitioners pray that the decree of the court below may be reversed, and the appellee's petition therein dismissed with costs.

THE UNION TRUST COMPANY OF NEW YORK,
THE ST. LOUIS AND CAIRO RAILROAD COMPANY,
Appellants.

By S. CORNING JUDD, and
WM. RITCHIE,
Their Counsel.

Brief in Support of Petition for Rehearing.

First Point.

"On the 29th of December, 1877, he (the receiver) presented a petition to the court asking its advice, . . . and whether he should protect the sureties in the event of adverse decisions. . . . The court . . . made a decree authorizing the receiver, in his discretion, . . . to protect such sureties, as in his judgment, ought to be protected in equity and good conscience by reason of the protection afforded to the property . . . by the giving of such bonds. . . . The receiver, *for alleged lack of funds* coming into his hands, failed to protect any sureties except two, one Rosborough and one Pellett."

Printed Opinion, p. 2.

"The reason he (the receiver) did not pay it seems to have been want of pecuniary funds."

Id., p. 4.

"The main pretense for not protecting Morrison and his co-sureties was that the receiver never had receipts in his hands with which he could have protected them."

. . .

"Until after the sale of the railroad and until the trust came to be wound up, the only plea was that the receiver had not realized sufficient funds from the current receipts of the road to enable him to protect the intervenor."

Id., p. 6.

That the above conclusions of the court are material to its final decision, is obvious. The receiver represented all parties, and was vested with discretion to pass upon the

merits of Morrison's claim and his title to protection. As this court says, that discretion was so vested apparently with the consent of all parties. If the receiver, acting under such circumstances, had passed upon this claim and rejected it *for no other reason* than his inability to pay it, the effect of his judgment as to the merits of the claim upon the rights of the parties here, could not but be very considerable, if not decisive.

But we submit that there is nothing in the record to support such a conclusion.

It is *stipulated* in the record that "the receiver never took any action" under the order authorizing him to protect sureties (Rec., p. 13), though before the master it was "admitted by both parties that said order as to sureties "did protect some—Rosborough and E. B. Pellet." (Rec., fol. 72.) *It is not even alleged by the intervenor* that a lack of funds was the *reason* why the receiver ignored his claim. His only averment is that the "re- "ceiver, since his appointment, has not been able, out of "the earnings of said railroad, to pay the said judgment "of the said Holbrook, and thus protect the sureties "on the said bond." (Rec., fol. 40.) The issue thus made by the claimant himself did not present any question as to what was the reason of the receiver's failing to protect this appellee under the order of February 4, 1878. The fact that the receiver *did* protect *some* sureties plainly raises an inference that for some reason, apart from a mere lack of funds, he exercised his discretion unfavorably to *this* claimant.

It must be borne in mind that at the time the receiver signed his petition (December 29, 1877), upon which said order was passed, he could have had no opportunity to inform himself as to the merits of these numerous claims

for protection, since at that time he had been in office but a few weeks.

Upon his action in filing this petition, therefore, it would be unreasonable to found any conclusion as to his opinion of the various claims.

There is enough in the record, we think, to satisfy this court that there were ample reasons why the receiver should pass unfavorably on Mr. Morrison's claim to protection. Upon the oral argument of this appeal, this court, through certain of its members, inquired of counsel where the decision of the Supreme court of Illinois in the Holbrook injunction suit could be found, and asked concerning its tenor. As a published decision of the highest court of this state required by law to be officially reported and recorded, as being distinctly referred to in the record here and as concerning directly the very subject-matter on which this appellee founds his claim, and as being a suit between the said Cairo and St. Louis Railroad Company and the said Holbrook, both of whom are parties to this cause also, we may upon the authority of *Gross* v. *Mortgage Company*, 108 U. S., 477, and other cases in this court, refer ourselves to the Illinois decision which is published in 92 Illinois, 299. From that decision this court will learn the following:

That the Holbrook judgment was obtained by default.

That the railroad company, in spite of its efforts to do so, was unable at any time thereafter to secure a trial on the merits.

That Mr. Morrison was then a *director of that company.*

That the Holbrook judgment was obtained *by service of*

process upon Mr. Morrison as such director, and yet, that said suit *was allowed to go by default!*

Can it be necessary to argue at length as to the reasons which must have impelled Mr. Morrison to go upon the company's injunction bond to stay a judgment so procured!!

And can a surety, whose liability has been thus incurred claim any special equities EVEN AS AGAINST HIS OWN PRINCIPAL!!

It is no reply to this to say that these questions were not presented before the master. Neither was the question of "diversion;" and yet this court, to promote what appeared to it to be substantial equity, found no difficulty in deciding that there must have been a "diversion," and that the amount of such diversion probably exceeded the amount of this claim!

In fact, *the issues below were so framed by the parties themselves that it was unnecessary, if not improper, for these appellants or the receiver to go into the question as to how Mr. Morrison came to sign the injunction bond.*

The intervenor himself alleged in his petition (Rec., fol. 40, 41), and the trust company and the receiver in their answer, admitted and averred (Rec., fol. 56) that the receiver had not been able, out of the earnings of the road in his hands to pay this claim, and when they come before the master, the intervenor dispenses with all necessity, or opportunity for any proofs of this or any other material facts set up in the answer (except the non-payment of the Holbrook judgment) by a formal *admission.* (Rec., fol. 72(2).)

Again, in his brief in this court (p. 15, last paragraph), appellee says: "The court will observe that the answer "to Morrison's supplemental petition alleges distinctly

" that there were no assets or funds turned over by the re-
" ceiver to the St. Louis and Cairo Railroad Company, out
" of which Morrison should have been paid; but no *proof*
" whatever in support of this averment appears in the
" record."

But the truth of this averment also (if it be material) was *admitted* by appellee before the master, as above noted.

These *admissions* were to the effect that the receiver had no funds or assets which were in equity applicable to this claim in preference to the mortgage debt; in other words, there was no "diversion." *In consistent conformity to the same view, we find appellee's own counsel in this court contending* that "the line of cases relating to prior-
"ity in the distribution of funds arising from a foreclos-
"ure sale of a railroad, which have been decided by this
" and other courts, beginning with *Fosdick* v. *Schall, does*
" NOT *seem to bear directly upon the question made* HERE."
Appellee's Brief, p. 12.

We thus find, therefore, that this claimant *conceded* below a fact which of itself was absolutely decisive of this case; and that such concession rendered it unnecesary, if not improper, for us to multiply issues, by formally raising the question as to how Mr. Morrison came to sign this injunction bond.

Can it then be imputed to us for an error of omission or commission, that we did not put into this record, save as it has been done, evidence as to the circumstances under which Morrison incurred his liability as surety?

Could we anticipate that this court would find in the deed of the receiver to the St. Louis and Cairo Railroad Company, evidence that there had been a "diversion,"

and that the funds so diverted would have sufficed to pay this claim, *notwithstanding the formal admissions of record* that such had *not* been the case?

Could we know, in advance, that the burden of proving a fact which our adversary had conceded to be true, would be deemed by this court *to rest on us?*

We submit, therefore, that if this court is to consider the question of "diversion" as in this case, then with *at least equal reason*, must it look into and weigh the circumstances appearing in 92 Ill., 297, which so materially affect the equities of appellee's claim.

Second Point.

"The trustees of the mortgage . . . stood by and saw Morrison (who had no interest in the matter) put his hands into the fire and rescue the rolling stock, of which they were to receive the benefit . . . Morrison's money or the fruits of it, has gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders whom they represented, the nominal purchasers, Horsey and Canda, or the *present company*. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company."

Printed Opinion, p. 5.

Unless the mere fact, that the present company is the grantee of the purchasers at the foreclosure sale, is, in and of itself, sufficient to constitute the two "one and the "same in interest," so as to charge the former with any and all equities that may exist against the latter, we are at a loss to find anything in this record to establish such a conclusion. The new company was simply a purchaser

pendente lite, who is affected, it is true, with the equities disclosed in the suit, *but with no others.*

We submit that, whatever may have been the duty of the mortgagees toward Mr. Morrison under all the actual facts of the case, yet the present company is bound by no duty toward him, unless the record of the suit itself showed, at the time of the sale, that his claim was *certain* and *fixed.*

At the time the new company bought and took possession, there was no possible means of knowing that Morrison's claim would ever become fixed and certain, because its maturity depended upon his own act and no one could know when, *if ever*, he would or *could* so act as to ripen that claim, viz.: by paying Holbrook. *Holbrook himself was before the court and had not been adjudged a lienholder paramount in equity to the mortgagees.* So far as the record shows or the facts would seem to indicate, there was no possibility that Holbrook ever would be so adjudged. The only claim which the court, by any general order, had up to that time expressed its purpose of treating as paramount in equity were claims for *labor* and *supplies* and for receiver's expenses. No general rule then known to the law had been announced which would serve as a warning to the new company that this character of claim would probably be allowed as paramount. As this court, in its opinion, concedes—"the case is a *special* one." Appellee's own counsel did not consider it as coming within the rule of *Fosdick* v. *Schall.* The order of December 22, 1881, ratifying the sale and ordering a conveyance subject to such claims as might be declared paramount liens, surely cannot be reasonably construed as warning the purchaser that whatever the individual judges of the court below might deem equitably

paramount should be so, regardless of any then known rules or principles of law. We submit that, to a purchaser, that order would mean only this: There are certain claims now before this court, the *facts* of which have not yet been passed upon by the court. Certain of those claims may be adjudged *true* in point of *fact;* and, in such event, *according to rules of law now well known, so that no purchaser can plead ignorance thereof*, such claims will, by the law itself, be pronounced liens against the purchaser. Those general rules of law had already been formulated and given effect by the *previous* order, which had *defined the general character* of the claims which would be deemed so paramount. To a purchaser, therefore, this record would convey simply this notice: "*Labor* and *supply* claims "and *receiver's expenses* will be given a preference, and will "constitute a lien in your hands. There are a number of "*such* claims now before this court. If you buy, you must "take the risk of having to pay such of *these* claims as "may be be found *true* in point of *fact*." Is it possible that a purchaser could reasonably expect to take subject to the undefined, unlimited "discretion" of the court below to impose upon it the payment of "special cases" not coming within any *previous* order of the court. *The language of the order of December 22, 1881, conveys no intimation of any purpose to administer any other rules for the adjustment of conflicting equities, save such as had already found expression in previous orders of the court.* We solicit the court's attention to pages 42–52 of of our original brief.

It must be borne in mind that this order of December 22, 1881, was entered nearly *six months after* the sale had been practically consummated. The purchasers had before

that paid their money and become entitled to the property. Any order, thereafter passed which by retroaction could adversely affect their rights, would plainly violate the clearest dictates of justice.

Third Point.

The opinion holds that from the order of January 22, 1882, directing the receiver to convey to the purchasers of their grantee any property he may have acquired during the receivership, it is sufficiently apparent that the receiver "had receipts with which he purchased new prop-"erty which went to increase the corpus of the fund of "which the bondholders received the benefit."

Printed Opinion, p. 6.

"It is not shown what these purchases and payments "amounted to, but they were probably considerable, and "the complainant and receiver could easily have shown "that they were insufficient for the indemnification of the "intervenor, if such had been the fact."

Ibid.

We have already shown how *this issue was eliminated from this case by the appellee himself.* He *alleged* in his petition that there were no such funds in the receiver's hands, and again made it unnecessary for us to submit any proofs on the subject by *admitting* it before the master. Is it possible we are bound to prove what our adversary deliberately *admits* to be true for the *very purpose of dispensing with proofs?*

Is it to be *assumed* that this new property was necessarily purchased with the *earnings* of the road during the receivership? May not some of it have been obtained by

what practically amounted to an *exchange* for a portion of the old *corpus* of the mortgaged property? May not the receiver have disposed of some of the old rolling stock or real estate, and with the proceeds thereof have procured this new property?

Is it to be *assumed* that this new property "went to *in-*"*crease* the corpus of the fund" *over what it had been before*, so that the security was *enhanced* thereby?

Again, what is there to show that this new property amounted to one thousand, much less fifteen thousand dollars? And suppose it to have equaled in value the amount of this claim, were there no other claimants who might be entitled to share with appellee, whose equities were on a par with his own? The receiver's petition of December 29, 1877, upon which appellee so relies, discloses the fact that there were a multitude of claimants whose equities, so far as appears, must at least have equalled appellee's, all being of precisely the same general nature. Was none of those others entitled to be "protected" by payment out of this same fund which this court treats as having been "diverted"? If so, is appellee entitled to full payment, or only his *pro rata* share?

As to the burden of proof in this matter resting upon the receiver—surely the *general* rule would be that one whose claim accrues subsequent to the execution of the mortgage and "stands, *prima facie*, on a different basis "from claims arising under the receivership," and can only "be brought within the principle" on which receivership debts are preferred "by special circumstances," (*Miltenberger* v. *Ry. Co.*, 106 U. S., 311), should at least himself be bound to show that *all* the conditions upon which he bases this *exceptional* claim do, in fact, exist.

Would he not have to show that there was *some* "diversion"? And, if so, would he not have to show also that the bondholders had so far profited by such diversion as that they were bound to make restitution? Can this be done here without showing not only that the receiver acquired new property, but that he did so *with funds primarily applicable to the payment of appellee's claim?* But we deem it conclusive of this whole matter, that appellee *conceded* below that there was *no* such "diversion," and *gave the receiver no opportunity to submit any proofs on the question!*

If the parties had deliberately agreed together and intended to submit this case WITH THE QUESTION OF "DIVERSION" ELIMINATED *therefrom and* the equities of appellee's claim based upon other and different issues, *they could not have taken better means to do so than they have done.*

Fourth Point.

"Much of the argument of the appellants is based on "the hypothesis that the claim of the intervener was a "claim to be subrogated to the lien of the Holbrook "judgment; and it is argued that this lien was subordi-"nate to that of the mortgage held by the complainants. "We do not understand that the claim *was presented in "any such view.*" *Printed opinion*, p. 7.

"To save the property from being taken, to prevent "the catastrophe which its taking would have caused and "the serious questions which would have arisen had it ac-"tually been sold, the intervenor gave his bond to obtain "an injunction. *It was not done for the purpose of being "subrogated* to the questionable rights of Holbrook under "his judgment, but to prevent the certain injury to the "property itself, which the attempted enforcement of "those rights would have involved." (*Ibid.*)

It is respectfully submitted that even though the precise technical rules which regulate the doctrine of subrogation may not, in all respects, be deemed applicable here, yet the equitable principle which those rules illustrate and enforce is peculiarly so, viz: *that the position of a* SURETY *for a debtor, with reference to other creditors* (even those subsequent in point of time) is one of *inferior and subordinate equity;* that, as to such third persons, the surety, in contemplation of law, is *identified with his principal* and must be considered as having, *prima facie, trusted his principal only*, so that, in contests with such third parties, he *must occupy the position of the common debtor.* (See pages 26—28, of our original brief.)

This principle is especially applicable to the case of sureties who become such in the course of legal proceedings for the purpose of staying execution and the like. In such cases, by preventing satisfaction of a judgment at a time when there may have been means out of which it could be made, the *presumption* is that other creditors have been *injured*, instead of benefited. It is true that the mortgage in this case purports to cover all the property of the debtor company, yet it is well known that, even when thus broad in its terms, such a mortgage may fail to cover any property save what is specifically enumerated and what is directly appurtenant to the railroad as such and necessary to the enjoyment of the railroad franchise.

Jones on R. R. Securities, Sec. 104.

Who can say that Holbrook might not have found wherewith to satisfy his claim without detriment to the mortgage security?

When we recall the circumstances already herein alluded